TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 181

FRANK A. HARRIGAN, TRUSTEE OF THE BANKRUPT ESTATE OF THE LOUIS J. BERGDOLL MOTOR COMPANY, PETITIONER,

vs.

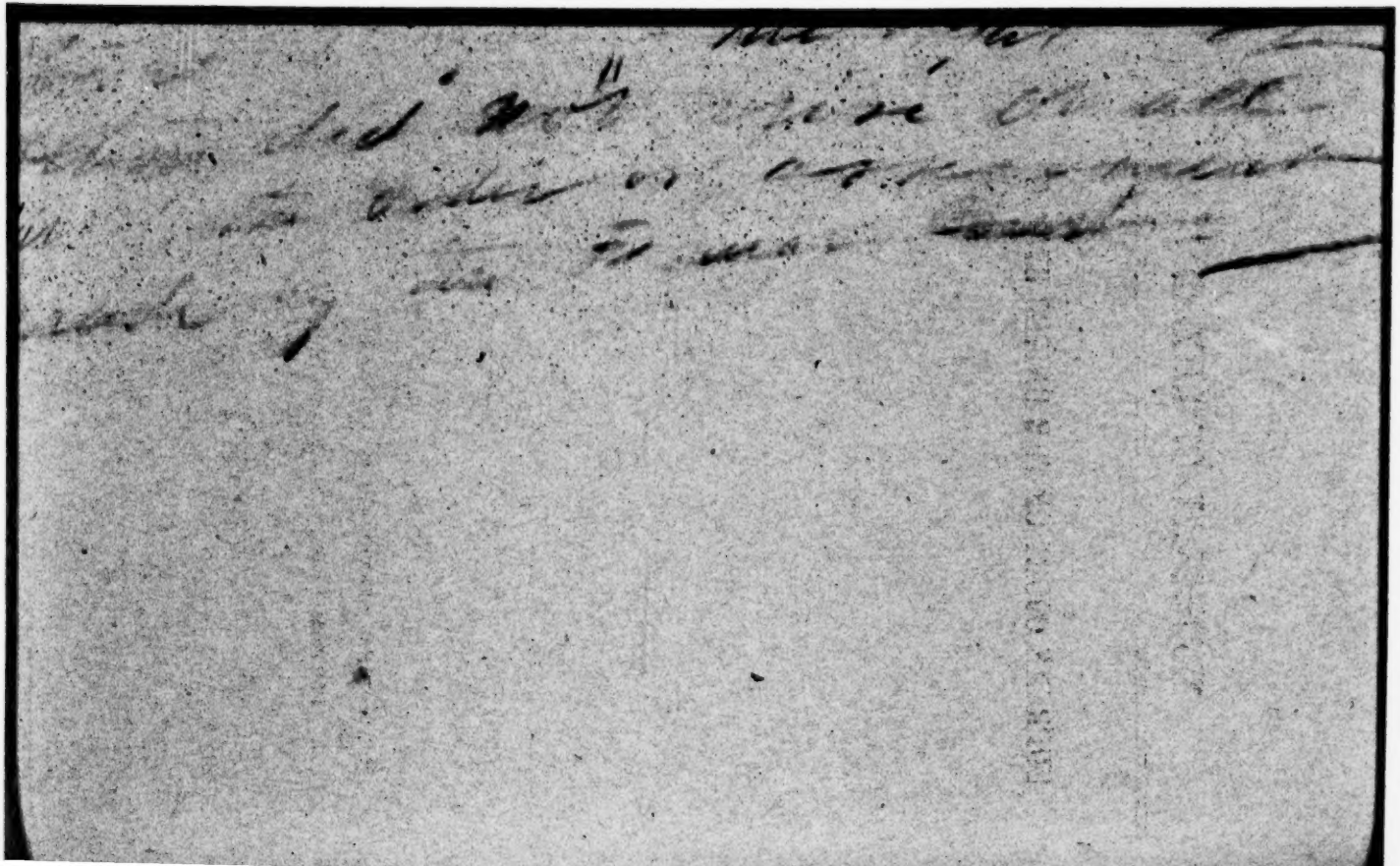
LOUIS J. BERGDOLL, NOW KNOWN AS LOUIS J. BERGSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

PETITION FOR CERTIORARI FILED SEPTEMBER 21, 1925

CERTIORARI GRANTED NOVEMBER 13, 1925

(30,633)



(30,633)

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fol. 1] **IN COURT OF COMMON PLEAS**

DOCKET ENTRIES

Sums. Asspt. exit July 13, 1921.
Served July 15, 1921.
July 18, 1921.—Statement and notice to file an affidavit of defense filed.
July 18, 1921.—Affidavit of service of statement upon Louis J. Bergson on July 15, 1921, with notice to file an affdt.
July 29, 1921.—Affidvt. of defense raising questions of law filed.
Dec. 13, 1921.—Plaintiff's amended statement and notice to file an affidvt. of defence filed.
Jan'y 4, 1922.—Affdt. of defense to plaintiff's amended statement of claim raising questions of law filed.
May 8, 1922.—It is adjudged that the defendant's objections to the amended statement of claim are not well taken and that the said statement of claim sets forth in proper form a valid cause of action (see opinion filed).
June 7, 1922.—Affd. of defence to plaintiff's amended statement of claim filed.
Feb'y 14, 1923.—Jury called.
Feb'y 15, 1923.—Verdict for the plaintiff for $192,909.24.
Feb'y 19, 1923.—Defendant's motion for a new trial.
Eo die.—Reasons filed.
Feb'y 19, 1923.—Defendant's motion for judgment N. O. V. filed.
March 10, 1923.—Sten. notes filed.
[fol. 2] February 13, 1924.—New trial refused.
Feb'y 13, 1924.—Motion granted and judgment is now ordered in favor of defendant and against the plaintiff non obstante veredicto (see opinion filed).
Feb'y 14, 1924.—Certiorari from S. C. of Jany. Term, 1925, No. 18, brought into office.
Eo die.—Appeal bond for costs filed.
Feb'y 21, 1924.—Certificate from S. C. of Jany. Term, 1925, No. 18, returned and filed.
Feb'y 14, 1924.—Petition to advance filed.
Feb'y 21, 1924.—Granted placed on list for weeks of May 19, 1924.
Mar. 15, 1924.—Appellee's answer to appellant's notice of questions to be argued on appeal and evidence not intended to be printed filed.
Mar. 18, 1924.—Notice of questions to be argued and evidence not intended to be printed filed.

[fol. 3] IN COURT OF COMMON PLEAS

AMENDED STATEMENT OF CLAIM

The plaintiff, Frank A. Harrigan, trustee of the bankrupt estate of the Louis J. Bergdoll Motor Company, claims of the defendant, Louis J. Bergdoll, now known as Louis J. Bergson, the sum of $155,571.97, and interest thereon from April 1st, 1912, upon a cause of action, whereof the following is a statement.

I

Plaintiff is the duly qualified trustee in bankruptcy of the Louis J. Bergdoll Motor Company of Pennsylvania, bankrupt, formerly located and engaged in business in the City of Philadelphia.

II

The said bankrupt company, in May, 1912, succeeded a corporation of the same name previously incorporated under the laws of the State of New Jersey, and then established in the automobile business at the southwest corner of 16th and Callowhill Streets, Philadelphia. The Pennsylvania corporation thereafter continued to operate said business in said city from, to wit, May 31, 1912, until April 11, 1913, when it was adjudged bankrupt on the petition of certain creditors duly filed in the District Court of the United States for the Eastern District of Pennsylvania, March 20, 1913. Proceedings were thereafter had before the late Richard S. Hunter, Referee in bankruptcy, under an order of the said District Court, entered April 11, 1913, and upon the death of the said Referee, [fol. 4] the said proceedings were duly referred by said court to Joseph Mellors, Esquire, Referee.

III

The bankrupt was incorporated under the laws of Pennsylvania on March 8th, 1912, with a capital stock of $500,000.00, consisting of 5,000 shares of the par value of $100.00 a share, and was organized for the purpose of manufacturing, buying, selling, trading and dealing in and with motors and motor vehicles of all kinds, and any appliances, accessories, contrivances or parts pertaining thereto.

IV

The names of the subscribers and the numbers of shares subscribed by each, as set forth in the application for letters patent for said corporation, are: Louis J. Bergdoll, 2,998 shares; E. Laurence Webster, 1 share; and Frank J. Fanning, 1 share; the said Bergdoll, Webster and Fanning were named in said application as directors of said company for the first year.

V

At the stockholders' meeting, held for the purpose of organization, the stockholders, then consisting of the said Bergdoll, Webster and Fanning confirmed and approved the selection of the said Bergdoll, Webster and Fanning, as directors for the first year, in accordance with the provisions of the application for the letters patent of said company, and thereupon said stockholders authorized the board of directors to issue capital stock of the company to the amount of $500,000.00, and to accept in full or part payment of said stock cash or property, as the said board should determine necessary for the business of the company.

[fol. 5]

VI

Subsequent to the incorporation of the said bankrupt company, and while said Bergdoll, Webster and Fanning were in control thereof as its board of directors, there were issued, on April 1st, 1912, 3,000 shares of the capital stock of said bankrupt company of the par value of $300,000.00, endorsed "full paid and non-assessable" as follows, to wit, to the said Louis J. Bergdoll, 2,998 shares; E. Laurence Webster, 1 share; and Frank J. Fanning, 1 share; the only consideration paid for all of said 3,000 shares of stock as found by the said referee Mellors, being the net assets of the said New Jersey Corporation of the value of $144,428.03.

VII

That the said E. Laurence Webster and the said Frank J. Fanning, were the nominal holders only of the two shares of stock subscribed for and subsequently issued to them as aforesaid and held said stock for and on account of the said Louis J. Bergdoll in the organization and conduct of the business of said corporation, and said two shares of stock were finally disposed of by them without consideration therefor by direction of the said Bergdoll.

VIII

That the consideration paid for said 3,000 shares of stock, to wit, the sum of $144,428.03, was grossly inadequate, and said transaction was conceived and consummated for the purpose of relieving the said New Jersey Company, then owned and controlled by the said Louis J. Bergdoll, from financial embarrassment.

[fol. 6]

IX

From the date of the adjudication in bankruptcy, in April 1913 until late in 1917, the estate was involved in litigation covering amounts approximating $750,000; one of the cases being carried to the United States Supreme Court. Until the litigation was disposed of, it was impossible to determine approximately to what extent the assets of the estate would fail to meet the estate obligations.

X

On October 22, 1917, the trustee filed his petition for (1) an assessment upon 3,000 shares of stock issued as aforesaid, and (2) for authority to institute proceedings for the collection of the amount of said assessment. Answers were filed by the said Louis J. Bergdoll wherein he controverted the right of the trustee to the assessment; claimed that full value was paid for said stock, and that it was issued "full paid and non-assessable"; that the question of his liability was res adjudicata, and, in conclusion, defendant asked that the trustee's petition be dismissed. The case was thereupon proceeded with, and on May 20, 1918, the Referee filed his opinion sustaining the petition and made an order upon the defendant to pay an assessment of 55 per cent of the par value of said stock. The Referee found inter alia as follows, and said findings are hereby averred as part of this statement of claim:

(a) On January 8, 1913, the said 3,000 shares of stock held as aforesaid by Bergdoll, Webster and Fanning, were assigned and transferred to Bergdoll's brothers, Erwin, Grover and Charles Bergdoll, under an agreement whereby Erwin Bergdoll undertook and agreed to manage and finance the bankrupt company.

[fol. 7] (b) Between the date said company was adjudged bankrupt, to wit, April 13, 1913, and December, 1912, during which period Louis J. Bergdoll, E Laurence Webster and Frank J. Fanning assigned and transferred said 3,000 shares of stock to Erwin R. Bergdoll, et al., there was no material change in the financial condition of the said bankrupt company.

(c) When said transfers of stock were made in 1913, said corporation was insolvent and unable to pay its many obligations, and all of the named parties to said transfers, knew, or had the means within their own control of knowing, that the said company was insolvent, and that said stock when assigned was not fully paid.

(d) The only consideration paid to the bankrupt company for said 3600 shares of capital stock issued by said company to Louis J. Bergdoll, et al., amounted to $144,428.03, and that there remains due and unpaid on said stock the sum of $155,571.97 with interest thereon from April 1, 1912.

(e) No assessment was ever made by the bankr-pt company for the amounts due and unpaid on said subscriptions.

XI

On appeal to the United States District Court, the order of the Referee of May 20, 1918, was reversed pro forma November 12, 1918, and the matter was re-submitted to the Referee for further proceedings. On February 14, 1919, the Referee entered his final order making an assessment of .5185 per cent of the par value of said 3,000 shares of stock, to wit, the sum of $155,571.97, and interest thereon, in all amounting to $219,771.34, and further ordered and [fol. 8] directed Bergdoll to pay the same. Said assessment and

order of the Referee is hereto attached and made a part hereof, marked "Exhibit A". On July 1, 1919, said order and assessment were affirmed and confirmed by the United States District Court. Defendant thereupon took an appeal to the United States Circuit Court of Appeals, argument was heard in January, 1920, and in March following, the decree of the District Court was reversed insofar as it determined the personal liability of the defendant, but insofar as said decree adjudicated the necessity of an assessment on said 3,000 shares of stock, the rate thereof, and as to those prima facie subject to the assessment, said decree was affirmed, and the costs of the appeal were put upon the defendant herein.

XII

The plaintiff, having ascertained that the defendant had changed his name to Bergson, and that he was domiciled in New York City, brought suit against the defendant in the U. S. District Court for the Eastern District of Pennsylvania. On May 16, 1921, defendant filed therein a plea to the jurisdiction and asked that the case be dismissed, supported by an affidavit, in effect, claiming to be a citizen of Pennsylvania and that he had been living only temporarily in New York City. By agreement of counsel, said case was discontinued of record July 13, 1921. The present suit was then brought.

Wherefore, plaintiff brings this suit to recover from the said Louis J. Bergdoll, now Bergson, the amount of said assessment, to wit, the sum of $155,571.97, and interest thereon from April 1, 1912; which said sum and interest said defendant hath refused and still doth refuse to pay.

Joseph W. Catharine, Attorney for Plaintiff.

[fol. 9] Sworn to by Joseph W. Catharine & Frank A. Harrigan. Jurat omitted in printing.

[fol. 10] Exhibit A to Amended Statement of Claim

Order

And now, to wit, this fourteenth day of February, 1919, the trustee herein having filed October 22, 1917, a petition in this cause having as its object the levying of an assessment upon 3,000 shares of capital stock of said bankrupt corporation, issued April 1, 1912, for an inadequate consideration, as follows: To Louis J. Bergdoll, 2,998 shares; to E. Lawrence Webster, 1 share, and to Frank J. Fanning, 1 share, in order to raise sufficient moneys to pay the debts of the bankrupt company and the costs of administration; and an order to show cause allowed by this Referee on October 24, 1917, upon the filing of the aforementioned petition, having been served personally upon the said Louis J. Bergdoll, E. Lawrence Webster and Frank J. Fanning, and upon the following persons to whom said stock was subse-

quently transferred prior to said company having been adjudged a bankrupt, Erwin R. Bergdoll, Charles A. Brawn (formerly known as Charles A. Bergdoll) Emma C. Bergdoll, Joseph M. Hubert, William Ruhland; and upon Grover C. A. Bergdoll by delivering a copy thereof to an adult member of his family at his home address in Philadelphia.

And this cause having come to be heard before Joseph Mellors, one of the Referees in bankruptcy of this court, in the presence of Joseph W. Catharine, Esq., solicitor for said petitioning trustee; Frank A. Harrigan, trustee; Louis J. Bergdoll, E. Lawrence Webster, Frank J. Fanning, Emma C. Bergdoll, Charles A. Brown and William Ruhland; and whereas, the said Louis J. Bergdoll filed an answer [fol. 11] to said petition wherein he controverted the right of said trustee to make an assessment upon said stock, and further contested and denied that he was individually or otherwise liable to assessment for the amount claimed to be due upon said stock; and whereas, proofs having been heard and briefs on behalf of the petitioning trustee and the said Louis J. Bergdoll having been submitted; and the opinion of Joseph Mellors, Referee, having been filed wherein and whereby he found that said 3,000 shares of the capital stock of the said bankrupt company of the par value of $300,000, were issued April 1, 1912, for an inadequate consideration as follows, to wit, to Louis J. Bergdoll, 2,998 shares; to E. Lawrence Webster, 1 share and to Frank J. Fanning, 1 share; that the whole amount paid for said 3,000 shares of stock was $144,428.03, which was contributed by the said Louis J. Bergdoll; that the said E. Lawrence Webster and the said Frank J. Fanning paid no consideration for the two shares of stock issued to them, and were merely the nominal holders thereof for the sole benefit of the said Louis J. Bergdoll in the organization and conduct of the business of the said bankrupt company; that on January 8, 1913, all of said 3,000 shares of stock, pursuant to an agreement entered into between the said Louis J. Bergdoll and Erwin R. Bergdoll, were assigned and transferred by the said Louis J. Bergdoll, E. Lawrence Webster and Frank J. Fanning as follows: To Erwin R. Bergdoll, 2,998 shares; to Charles A. Bergdoll, 1 share; to Grover C. A. Bergdoll, 1 share; that at the time said 3,000 shares of stock were transferred by the said Louis J. Bergdoll, E. Lawrence Webster and Frank J. Fanning to Erwin R. Bergdoll, et al., said bankrupt company was insolvent and there was due upon said stock [fol. 12] the difference between the amount paid for it, to wit, $144,428.03 and its par value of $300,000, to wit, the sum of $155,571.97; that on March 5, 1913, the said two certificates of stock theretofore issued to Charles A. Bergdoll and Grover C. A. Bergdoll, were transferred and assigned by them to said Erwin R. Bergdoll; that on March 6, 1913, the said Erwin R. Bergdoll transferred said 3,000 shares of stock without any consideration being paid therefor, as follows: To Emma C. Bergdoll, 2,997 shares; to Joseph M. Hubert, 1 share; to E. J. Teague, 1 share and to William Ruhland, 1 share; that at the time the said bankrupt company was adjudicated a bankrupt, said 3,000 shares of stock were registered on the books of said company in the names of the said Emma C. Bergdoll, Joseph M.

Hubert, E. J. Teague and William Ruhland, in the amounts above stated.

And said Referee having further found, in his opinion filed in this cause, that the corporate assets of said bankrupt company are insufficient to meet the corporate debts and that the said stock was issued to the original holders thereof, to wit, Louis J. Bergdoll, to E. Lawrence Webster and Frank J. Fanning, to the number of shares herein above set out, without the company having received an adequate consideration from said stockholders or from any one acting on their behalf, or from any person or persons whatsoever, and that the said trustee is entitled to the relief asked for in said petition, and that an order be entered for an assessment of .55 per cent of the par value of the said 3,000 shares of the capital stock of the said bankrupt company, to be levied upon the said stock. And it further appearing that said assessment should be for .5185 per cent, instead of .55 per cent.

It Is Therefore, on this fourteenth day of February, 1919, upon [fol. 13] motion of Joseph W. Catharine, solicitor for said petitioning trustee, ordered, adjudged and decreed that the said Louis J. Bergdoll be and hereby is assessed for .5185 per cent of the par value of the said 3,000 shares of capital stock of said bankrupt company, to wit, the sum of $155,571.97, with interest thereon from April 1, 1912.

And it is further ordered, that in accordance with said assessment the said Louis J. Bergdoll shall pay to the trustee the amount thereof, with interest from April 1, 1912, to wit, the sum of $219,771.34.

And it is further ordered, that said trustee proceed forthwith to collect from the said Louis J. Bergdoll the amount of said assessment hereinabove levied.

Joseph Mellors, Referee.

I hereby certify that the foregoing is a true and correct copy of the plaintiff's amended statement of claim this day filed in the above case.

Joseph W. Catharine, Attorney for Plaintiff.

12-13-21.

[fol. 14] IN COURT OF COMMON PLEAS

AFFIDAVIT OF DEFENSE

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

Louis J. Bergson, being duly sworn according to law, deposes and says that he is the defendant above named, and that he has a just and true defense to the whole of the plaintiff's claim of the following nature and character, to wit:

1. The averments of paragraph 1 are admitted.

2. The averments of paragraph 2 are admitted.

3. The averments of paragraph 3 are admitted, with the qualification, however, that the said capital stock of $500,000, consisting of 5000 shares of the par value of $100, was the authorized capital stock.

4. The averments of paragraph 4 are admitted.

5. The averments of paragraph 5 are admitted.

6. The averments of paragraph 6 are admitted, with the exception that the defendant denies that the said stock was issued on April 1, 1912. He says that the said stock was issued about the latter part of May, 1912. The defendant also denies that the only consideration [fol. 15] paid for all of the said 3,000 shares of stock were the net assets of the New Jersey corporation of the value of $144,428.03, the true facts in regard to the consideration given and paid for the said 3,000 shares being as hereinafter set forth.

7. The averments of paragraph 7 are admitted.

8. The averments of paragraph 8 are denied. The defendant denies that the consideration paid for the said 3,000 shares of stock was the sum of $144,428.03; denies that the consideration paid for the said 3,000 shares of stock was grossly inadequate; denies that the transaction was conceived and consummated for the purpose of relieving the said New *New* Jersey Company, then owned and controlled by the defendant, from financial embarrassment, and for further answer to the averments of said paragraph, as well as to certain averments contained in the preceding and succeeding paragraphs of the statement of claim, the defendant says that the true facts in regard to said transaction were as follows:

On or about February 1, 1910, the "Louis J. Bergdoll Motor Company," hereinafter called the "New Jersey Company" for purposes of distinction, was incorporated under the laws of the State of New Jersey with an authorized capital of $500,000 divided into 5,000 shares of the par value of $100 each, for the purpose of engaging in the business of manufacturing, buying, selling, trading and dealing in and with motors and motor vehicles of all kinds, and appliances, accessories, contrivances or parts pertaining thereto. 20 shares of the capital stock of said New Jersey Company were subscribed for and issued on said date as follows: The defendant 18 shares, and one share each to F. R. Hansell and John A. McPeak, [fol. 16] nominees of the defendant. The company began the business of manufacturing and selling automobiles, etc., at 16th and Callowhill Streets in the City of Philadelphia, Pennsylvania, and continued in said business until May, 1912. Prior to March 18, 1912, the defendant had advanced $300,000 to the New Jersey Company, which moneys the New Jersey Company used in its business conducted in Philadelphia, as aforesaid. In payment for such advancements he received no certificates of stock, with the exception of the 20 shares hereinbefore referred to, nor did he receive any notes or other certificates of indebtedness.

In the beginning of the year 1912, the defendant determined that

it was desirab-e that the business which was conducted at 16th and Callowhill Streets in the City of Philadelphia be carried on by a corporation organized under the laws of the state in which it did business, to wit, the Commonwealth of Pennsylvania, rather than by a corporation organized under the laws of the State of New Jersey. In order to effectuate this plan, he caused a company to be incorporated under the laws of Pennsylvania, with the same name as the New Jersey Company, to wit, "Louis J. Bergdoll Motor Company." This company will hereinafter be referred to, for the purpose of convenience, as the Pennsylvania Company. The Pennsylvania Company was incorporated March 18, 1912, with an authorized capital stock of $500,000—divided into 5,000 shares of the par value of $100 each, being the same authorized capital stock as the New Jersey Company. The defendant and E. Lawrence Webster and Frank J. Fanning, his nominees, were the incorporators of the Pennsylvania Company and the subscribers to the capital stock. The de- [fol. 17] fendant subscribed to 2,998 shares, and his nominees to one share each, the total subscriptions being 3,000 shares of the par value of $100 each, totaling $300,000, the exact amount of the advancements which the defendant had made to the New Jersey Company.

The Pennsylvania Company was duly incorporated and organized, the board of directors being authorized at the first meeting of the incorporators to issue capital stock of the company to the amount of $500,000, and to accept in full or part payment for such stock cash or other property which the board might determine to be necessary for the business of the company.

Thereafter, to wit, in the latter part of May, 1912, the defendant, being in effect the sole owner of all of the stock of the New Jersey Company, caused the New Jersey Company to transfer to the Pennsylvania Company all of the assets of the New Jersey Company, including cash, parts, machinery, tools and equipment, accounts and notes receivable, good will and everything used and usable in the business of the New Jersey Company, under and subject to all the liabilities of the New Jersey Company, including the liability to the defendant in the sum of $300,000—as hereinbefore set forth, and the Pennsylvania Company thereupon became vested with the right, title and interest to the assets of the New Jersey Company and assumed all of its liabilities and obligations as aforesaid.

The fair value of the assets thus transferred by the New Jersey Company to the Pennsylvania Company was in excess of $415,000. The liabilities of the New Jersey Company, excluding the liability to the defendant in the sum of $300,000, on account of moneys ad- [fol. 18] vanced to the New Jersey Company by him as aforesaid, totaled $112,855.75.

In discharge of the liability of the New Jersey Company to the defendant in the sum of $300,000, which liability was assumed by the Pennsylvania Company as aforesaid, the Pennsylvania Company issued to the defendant and his nominees the said 3,000 shares of the capital stock of the Pennsylvania Company of the par value of $100 each, and the defendant accepted the same in full satisfaction

of said liability. The said 3,000 shares of stock were issued by the company and received by the defendant as full paid and non-assessable, the certificates issued being endorsed to that effect. Copies of the certificates issued to the defendant and his nominees are attached hereto, made part hereof and marked Exhibits A, B and C, respectively.

The whole purpose and intention and the effect of the foregoing transactions was to substitute for the New Jersey Company the Pennsylvania Company, with the same assets, and subject to the same liabilities for the purpose of carrying on the same business at the same place. And after the said transactions were consummated, the New Jersey Company ceased to carry on any business whatsoever, the business theretofore carried on by the New Jersey Company being continued without interruption by the Pennsylvania Company.

No notice was given by either the New Jersey Company or the Pennsylvania Company to the creditors of the New Jersey Company or the persons with whom it had done business, that the business was to be conducted by the Pennsylvania Company, but on the contrary the Pennsylvania Company continued to do business under the same [fol. 19] name as the New Jersey Company, to wit, Louis J. Bergdoll Motor Company, and used the same printed contracts, letterheads, bill heads, etc., without change. The Pennsylvania Company paid many of the liabilities of the New Jersey Company and continued to deal with the same individuals as the New Jersey Company had dealt until the company was adjudicated bankrupt in April, 1913. The failure of the company was caused by mismanagement following the retirement of the defendant from the management of the business on account of illness.

9. It is admitted that from the date of the adjudication in bankruptcy of the Pennsylvania Company in April, 1913, until late in 1917, the estate was involved in litigation covering amounts approximating $750,000, one of the cases being carried to the United States Supreme Court, but the defendant says further that the said litigation uniformly terminated favorably to the estate, claims made against the estate being adjudicated against the claimant, the result of which was to increase the assets remaining in the hands of the trustees and to decrease the debts payable out of the same. The defendant admits that until the litigation was disposed of, it was impossible to determine approximately to what extent the assets of the estate would fail to meet the estate obligations, but further says that it was at all times known to the plaintiff after his appointment, or at least within a period of six months thereafter, that the assets of the estate would fail to meet the obligations by at least $190,000 (which discrepancy would have been increased rather than decreased had the said litigation referred to in said paragraph terminated otherwise [fol. 20] than it did, to wit, in favor of the estate), and that the assets of the estate would fail to meet the liabilities by an amount in excess of the amount now demanded of the defendant.

10. The defendant admits that on October 22, 1917, the trustee filed his petition for (1) an assessment upon 3,000 shares of stock

issued as aforesaid, and (2) for authority to institute proceedings for the collection of the amount of said assessment. The defendant denies, however, that answer were filed by him wherein he controverted the right of the trustee to the assessment. The answers filed by the defendant in the above proceedings, as a creditor interested in the administration of the etsate, questioned the advisibility of making such an assessment and proceeding by law to attempt to collect the same, by calling the attention of the Referee to the fact that full value had been paid for the stock; that it had been issued "Full paid and non-assessable," and that the Referee had held said stock to be fully paid and non-assessable in a prior proceeding. The defendant, as a creditor, called the attention of the Referee to this fact in order to save the estate futile and unwarranted expense. After hearing had upon said petition and answers, the said Referee, at the suggestion of the plaintiff, not only made orders assessing the said shares of stock and directing the trustee to proceed to collect the amount of said assessment from the defendant, but proceeded to order and direct the defendant to pay to the trustee the amount of said assessment with interest. The said Referee had no power or authority under the law to decree and order a personal judgment against the defendant, [fol. 21] the effect of which was to prevent the defendant from presenting the defenses herein set forth to a proper tribunal having jurisdiction to determine the validity of the same. The appeals thereafter taken by the defendant, as set forth in paragraph 11 of the statement of claim, which terminated by a holding of the United States Circuit Court of Appeals for the Third Circuit, to the effect that the Referee had no power to make such order, were made necessary by the improper action of the Referee, taken at the instance of the plaintiff.

The defendant admits that the Referee found, as set forth in paragraphs 10a, 10b, 10c, 10d and 10e, but insofar as the same are averred as part of the statement of claim, the defendant answers as follows:

10a. The averments of paragraph 10a are admitted.

10b. The averments of paragraph 10b are denied. After the assignment referred to in said paragraph, the company became insolvent under the management of the assignee and the bankruptcy resulted therefrom.

10c. The defendant denies that when the said transfers of stock were made in 1913, the Pennsylvania Company was insolvent and unable to pay its many obligations, and denies that all of the named parties to said transfers knew, or had the means within their control of knowing, that the said company was insolvent, and the defendant denies that the said stock, when assigned, was not full paid, and avers upon the contrary that the company was solvent; that its assets [fol. 22] exceeded its liabilities exclusive of its capital stock, and avers that the said stock, when assigned, was full paid, for the reasons hereinbefore set forth.

10d. The defendant denies that theonly consideration paid to the bankrupt company for the said 3,000 shares of the capital stock

issued by the said company to the defendant, et al., amounted to $144,428.03, and that there remains due and unpaid on said stock the sum of $155,571.91, with interest thereon from April 1, 1912, and says on the contrary that the consideration paid to the bankrupt company for the said 3,000 shares of stock amounted to $300,000, as hereinbefore set forth.

10e. The defendant admits that no assessment was ever made by the bankrupt company on the said stock, but further says that the company could not, as a matter of law, make any assessment on account of said stock or the subscriptions, for the reason that the Pennsylvania Company issued, and the defendant accepted the said stock as full paid in full satisfaction of the claims of the defendant against the New Jersey Company, which had been assumed by the Pennsylvania Company.

11. The averments of paragraph 11 are admitted. The defendant, however, further says that all of their proceedings were made necessary by the action of the Referee, who, at the instance of the plaintiff, ordered and directed the defendant to pay the assessment made against it, which said order the said Referee had no power or authority to make under the facts or the law. A copy of the opinion of [fol. 23] the United States Circuit Court of Appeals reversing the decree of the District Court is attached hereto, made part hereof, and marked "Exhibit D."

12. The averments of paragraph 12 are admitted. The defendant, however, says that the same are immaterial.

13. And by way of further defense to the claim of the plaintiff, the defendant says that the alleged claim of the plaintiff is barred by the Statute of Limitations of the Commonwealth of Pennsylvania, for the reason that the alleged cause or causes of action occurred or accrued more than six years prior to the suing or bringing of the instant suit, and no facts are pleaded which would toll the bar of the statute.

14. And by way of further defense to the claim of the plaintiff, the defendant says that after the institution of bankruptcy proceedings against the Pennsylvania Company and after it had been adjudged that the assets of the Pennsylvania Company should be distributed proportionately among the creditors of the New Jersey Company, because the Pennsylvania Company had assumed the liabilities of the New Jersey Company, the defendant filed a proof of debt in the said bankruptcy proceedings in which he claimed, inter alia, for the said $300,000, advanced as aforesaid to the New Jersey Company, less $2,000 credit on account of stock of the New Jersey Company delivered to him as aforesaid, to which claim the plaintiff filed exceptions. Hearings were had in due course, at which all of the facts in regard to the transactions hereinbefore set forth were [fol. 24] fully developed before Referee Hunter to whom the said bankruptcy proceedings had been referred, in the course of which hearings the plaintiff offered in evidence the stock certificates of the

Pennsylvania Company for the said 3,000 shares issued to the plaintiff and his nominees as aforesaid, for the purpose of proving that the said $300,000 represented advances made by the defendant to capital, and that the defendant had received certificates of stock corresponding with the said advances and in satisfaction thereof. After said hearings, and as a result of the evidence produced therein, the said Referee found under date of January 7, 1915, as follows:

"The Referee finds that the sum of $300,000 was contributed by Louis J. Bergdoll to the capital stock of the New Jersey Company, and that the stock of the Pennsylvania Company which took over its assets and liabilities, thereby became fully paid.

"The Referee disallows the claim of Louis J. Bergdoll against the bankrupt for the sum of $300,000."

The said findings and order, not being appealed from became final, and inasmuch as they were made in due course by a competent tribunal in proceedings in which the issue was in part whether or not the said stock of the Pennsylvania Company was paid for in full by the defendant, the question is now res adjudicata and the plaintiff in the proceedings is estopped to prove that the stock was not paid for in full by the defendant.

15. And by way of further defense to the claim of the plaintiff, the defendant says that none of the creditors of the bankrupt [fol. 25] Pennsylvania Company, for and on whose behalf the plaintiff brings the present action, extended credit to the Pennsylvania Company upon the faith of the defendant's subscriptions to the capital stock of the Pennsylvania Company or the issuance of said 3,000 shares to him and his nominees. He avers that the said creditors, so far as they extended credit to the Pennsylvania Company, extended credit upon the faith of financial reports received by them from mercantile agencies and otherwise, which set forth the real financial condition of the company. In particular, the defendant avers that the total claims proved and allowed against the bankrupt estate of the Pennsylvania Company, including the conditional allowance of a claim in favor of the defendant in the sum of $52,500, totalled $291,881.12. Of said claims, a number thereof amounting to about $43,000, arose out of transactions between the claimant and the New Jersey Company, which were completed prior to the transfer of the assets of the New Jersey Company to the Pennsylvania Company, subject to said liabilities as hereinbefore set forth, credit for which transaction was extended solely to the New Jersey Company. Claims approximating $103,000 arose out of continuing contracts entered into by the New Jersey Company and carried out with the Pennsylvania Company the claimants extending credit for the same on the faith of the New Jersey Company. Claims approximating $91,000 were proved by claimants, including the defendant, who had full knowledge of the exact facts hereinbefore set forth and who either participated therein personally or whose officers were a party thereto. The defendant is unable to give particulars in regard to the names of the said claimants and the amount of their

[fol. 26] claims, and the transactions out of which they arose, for the reason that the books and records of both the New Jersey Company and the Pennsylvania Company in which the transactions are recorded in full are in the possession of the plaintiff. The defendant is the present owner of claims against the bankrupt estate totalling $161,498.44, including claims proved by him on his own behalf, and claims assigned to him by proper documents on file in the bankruptcy proceeding. The defendant admits that he had full knowledge of the transactions hereinbefore set forth, and waives any right to prove or claim that the creditors whose claims had been assigned to him extended credit to the Pennsylvania Company on the faith of the defendants' subscription to its capital stock or the issuance of stock to him, and admits for the purposes of this case that the said creditors had full knowledge of the facts hereinbefore set forth. And the defendant further says that the creditors who did not have knowledge of the facts hereinbefore set forth extended credit not upon the faith or to the Pennsylvania Company, but upon the faith and to the New Jersey Company with which they thought they were dealing. The defendant is advised by counsel and therefore avers that even if he were liable for the alleged unpaid subscriptions to the Pennsylvania Company he would be liable only to such creditors as extended credit to the Pennsylvania Company upon the faith of his subscriptions to the stock of the Pennsylvania Company or upon the issuance of stock to him. In as much as none of the creditors extended credit to the Pennsylvania Company upon that basis, the defendant is not liable to the said creditors or to the plaintiff who represents them.

[fol. 27] Wherefore, the defendant denies that he is indebted to the plaintiff in the sum of $155,571.97, with interest thereon from April 1, 1912, or in any other sum whatsoever.

Louis J. Bergson. Harry C. Kohlhas, Jr., W. Scott, Attorneys for Defendant.

Sworn to and subscribed before me this 6th day of June, 1922. Geo. H. B. Martin, Notary Public. Commission expires April 2, 1925.

Exhibit A to Affidavit

(Certificate)

Incorporated under the Laws of the State of Pennsylvania

Bergdoll

Number: 1. Cancelled. Shares: 2,998.

Capital Stock: $500,000. Shares: $100 each.

Louis J. Bergdoll Motor Company, Full Paid and Non-assessable

This Certifies that Louis J. Bergdoll is the owner of Twenty-nine hundred and ninety eight Shares of the Capital Stock of the Louis J. Bergdoll Motor Company transferable only on the books of the [fol. 28] Company by the holder hereof in person or by duly authorized Attorney upon surrender of this Certificate properly endorsed.

Witness the Seal of the Company and the (Corporate signature of its duly authorized officers Seal) affixed this First day of April, 1912.
Louis J. Bergdoll, President. E. Lawrence Webster, Treasurer.

(Endorsement:) For value received I hereby sell, assign and transfer unto Erwin R. Bergdoll the within (2998) Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint —— —— Attorney to transfer the said stock on the Books of the within named Company with full power of substitution in the premises. Dated Jan. 7th, 1913. Louis J. Bergdoll. (Seal.) Sealed and delivered in the presence of Chas. A. Bergdoll.

Exhibit B to Affidavit

Certificate No. 2

Stub same as No. 1.

Certificate same as No. 1 except name of party to whom issued and number of shares—Number of shares 1—name of party, E. L. Webster. Certificate marked Cancelled.

[fol. 29] (Endorsement:) For value received — hereby sell, assign and transfer unto Grover C. A. Bergdoll — Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint Grover C. A. Bergdoll Attorney to transfer the said stock on the Books of the within named Company with full power of substitution in the premises. Dated —— —, 19—. E. Lawrence Webster. (Seal.) Sealed and delivered in presence of —— ——.

EXHIBIT C TO AFFIDAVIT

Certificate No. 3

Stub same as No. 1.

Certificate same as No. 1 except as to name of party to whom issued and number of shares—Number of shares 1—name of party Frank J. Fanning. Certificate marked Cancelled.

(Endorsement:) For value received — hereby sell, assign and transfer unto Chas. A. Bergdoll — Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint Chas. A. Bergdoll Attorney to transfer the said stock on the Books of the within named Company with full power of substitution in the premises. Dated —— —, 19—. Frank J. Fanning. (Seal.) Sealed and delivered in the presence of —— ——.

[fol. 30] EXHIBIT D TO AFFIDAVIT

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 2489, October Term, 1919

LOUIS J. BERGDOLL, Appellant,

vs.

FRANK A. HARRIGAN, Trustee of the Estate of Louis J. Bergdoll Motor Co., a Bankrupt, Appellee

On Appeal from and Petition to Revise an Order in Bankruptcy of the United States District Court for the Eastern District of Pennsylvania.

Before Buffington and Haight, Circuit Judges

OPINION

HAIGHT, Circuit Judge:

The order appealed from assesses certain of the capital stock of the [fol. 31] bankrupt, the Louis J. Bergdoll Motor Co., a Pennsylvania corporation, for the difference between the amount alleged to have been paid therefor and the par value thereof, to meet the debts of the bankrupt; imposes a judgment for a large sum of money on the appellant by reason of his having at one time held practically all of such stock; and directs the trustee in bankruptcy to collect the sum so adjudged to be due. Although not specifically so adjudicating, the order recites that the Referee had found, because of insufficiency of assets to meet the debts of the bankrupt, that it was necessary to

assess all of the capital stock which had been issued for an inadequate consideration, and had fixed the rate of assessment thereon. The order was made pursuant to a petition of the trustee, wherein he prayed that an assessment, at a certain rate, be made upon every share of the capital stock of the bankrupt which had been issued at less than its par value or upon which the full amount of its par value had not theretofore been paid; and that he be authorized to institute such proceedings or suits as might be proper against the appellant and others, whom the petition alleged were or had been holders of such capital stock, "for the collection or recovery of such amounts as may be due respectively by them as subscribers for or holders of said" shares. The petition was presented at a meeting of the creditors of the bankrupt and on the same day an order was made strictly in accordance with the prayer of the petition. Two days thereafter that order was vacated by the Referee and another made, which directed the appellant and the others against whom the petition prayed that suits might be instituted as above stated, to show cause "why the [fol. 32] prayers of said petition should not be granted." In response to the order to show cause, the appellant appeared and filed an answer to the petition.

Thereafter testimony was taken before the Referee and, eventually, the order appealed from was entered. Among other reasons advanced for a reversal of the order is that the appellant did not consent to the exercise by the bankruptcy court of jurisdiction to finally adjudicate, as it did, his liability for such assessment, and that in the absence of such consent, it was without jurisdiction to do so. With the proposition of law embodied in that contention, both the Referee and the learned judge of the court below, of course, were in accord, but each felt that the appellant had so consented and, hence, that the judgment in question could be rendered against him. There are two entirely separate and distinct branches of the proceedings to compel the payment by a stockholder of a bankrupt corporation of any moneys due on his stock, *viz.*; first, a determination by the court as whether it is necessary to assess such stock for the purpose of paying the debts of the bankrupt and the necessary costs of administration, and if so, then the fixing of the rate of the assessment and the levying of the same upon whatever stock may appear prima facie to be subject thereto; and second, if a stockholder disputes his individual liability as prima facie determined, then the institution by the trustee of an appropriate suit or proceeding to fix definitely his liability or non-liability for the assessment and the amount thereof. The first branch is purely administrative and is binding upon any stockholder in any subsequent proceedings instituted to fix his personal liability; but in respect to the second branch, the stockholder may make any defense which may effect [fol. 33] his individual liability, other than the correctness of the administrative order. In re Newfoundland Syndicate, 201 Fed. 917 (C. C. A. 3rd Cir.) and In re M. Stipp Const. Co., 221 Fed. 372 (C. C. A. 3rd Cir.). In recognition of this general rule, the trustee's petition, as before noted, prayed that the court might first

make the assessment and then might authorize the trustee to institute such suits as should be necessary to collect the amounts assessed. The appellant, as a creditor of the bankrupt or a substantial amount and as one of the stockholders against whom it was proposed by the trustee to institute a suit for the collection of unpaid stock subscriptions, was surely entitled to avail h-mself of the opportunity offered by the order to show cause and contest, before the Referee, not only the necessity for an assessment but also the advisibility of making one. To that extent, we think he could appear and take part in the proceedings without submitting himself to the jurisdiction of the bankruptcy court to fix his individual liability for unpaid stock. Likewise, his appearance and the grounds upon which he proposed to oppose the administrative act of making an assessment could be made formally by answer, as well as otherwise, without subjecting him to the jurisdiction of that court. The important question, therefore, is whether his appearance and subsequent participation in the proceedings on the trustee's petition before the Referee justified a finding that he consented to the exercise of jurisdiction over him and to relinquish the right conferred by Section 23-b of the Bankruptcy Act. Without attempting to burden this opinion with a recital of the substance of his answer and of the details of his subsequent participation in the proceedings, it is suffi- [fol. 34] cient, we think, to observe that every affirmative allegation of the answer is as consistent with an intention to merely contest the advisability of making the administrative order of assessment as a desire to resist, in that particular proceeding, his individual ultimate liability for any such assessment. If the affirmative allegation of his answer had been substantiated and the legal effect thereof had been as he contended, any subsequent proceedings, looking towards the assessment of any of the capital stock of the bankrupt, would have been useless and produced an unwarranted expense. The same may be said of the paragraph of his answer which denied certain of the allegations of the petition, when it is considered in connection with the other allegations of the answer. So far as the record shows, the only evidence offered by him to support his answer was the record of another proceeding, which he relied upon to support one of the affirmative allegations of his answer to the effect that the question as to whether the stock sought to be assessed had been fully paid for was res adjudicata. He was examined as a witness by the trustee and took part in the cross-examination of one or two witnesses called by the trustee. He offered no evidence to show that the assets which were transferred to the bankrupt and for which the Referee found that the stock in question had been issued, were not equal in value to the par value of the stock issued for them, nor did he endeavor in any way to contest his individual liability except as the same might be also incidentally affected by his effort to show the inadvisibility of proceeding with the assessment. As the trustee could enforce any such liability only in a plenary action instituted in a court where the [fol. 35] bankrupt might have brought it, unless by consent of the appellant, the burden was upon the former to demonstrate that the

latter had consented to the jurisdiction of the bankruptcy court. The appellant vigorously contests here, as he did in the court below, that he ever, in fact, intended to so consent, or in law did so, and insists, in view of the two-fold character of the prayer of the trustee's petition, he had always assumed that he would be afforded an opportunity, in a plenary action to be instituted against him in case an assessment should be ordered, to set up one or more defenses which would defeat any alleged individual liability on his part, notably that the assets for which the stock of the bankrupt was issued, were worth the par value of the stock. In view of the two-fold character of the proceedings to assess stock the prayer of the trustee's petition conforming thereto, and the fact that the appellant's appearance and participation in the proceedings which followed the order to show cause were as consistent with an intention on his part to resist the administrative order of assessment as to contest his own liability, and considering that the burden was on the trustee to establish that the appellant had consented to the exercise of summary jurisdiction by the bankruptcy court; and bearing in mind the law's willingness to give everyone an opportunity to have his rights fully presented and passed upon; we are of opinion that the court below erred in holding that the appellant had consented to the exercise by the bankruptcy court of jurisdiction to determine his ultimate liability or non-liability.

Therefore, the order appealed from, insofar as it fixes the personal liability of the appellant and the amount thereof, will be re-[fol. 36] versed; but insofar as it adjudicates the necessity for an assessment on the stock of the bankrupt and the rate thereof, and as to those who appear prima facie subject to the assessment, it will be affirmed. The costs of this appeal must be borne by the appellant.

IN COURT OF COMMON PLEAS

OFFERS IN EVIDENCE

Testimony

Wednesday, February 14th, 1923.

Present: Joseph W. Catharine, Esq., representing the plaintiff; Walter B. Gibbons, Esq., representing the defendant.

Jury empaneled and sworn February 14th, 1923.

Transcript of Testimony, Rulings of the Court, Charge of the Court, and Exceptions

[fol. 37] Evidence on Behalf of the Plaintiff

Mr. Catharine: I offer in evidence the allegations of the statement which have been admitted by the defendant.

I will read paragraph 1 of the plaintiff's statement of claim:

"1. Plaintiff is the duly qualified trustee in bankruptcy of the Louis J. Bergdoll Motor Company of Pennsylvania, bankrupt, formerly located and engaged in business in the City of Philadelphia,"

I will read paragraph two of the statement of claim:

"2. The said bankrupt company in May, 1912, succeeded a certain corporation of the same name previously incorporated under the laws of the State of New Jersey, and then established in the automobile business at the southwest corner of 16th and Callowhill Streets, Philadelphia. The Pennsylvania Corporation thereafter continued to operate said business in said city from, to wit, May 31st, 1912, until April 11th, 1913, when it was adjudged bankrupt on the petition of certain creditors duly filed in the District Court of the United States for the Eastern District of Pennsylvania, March 20th, 1913. Proceedings were thereafter had before the late Richard S. Hunter, Referee in bankruptcy, under an order of the said District Court entered April 11th, 1913, and upon the death of the said Referee the said proceedings were duly referred by said court to Joseph Mellors, Esquire, Referee."

I will read paragraph three of the plaintiff's statement of claim:

[fol. 38] "3. The bankrupt was incorporated under the laws of Pennsylvania on March 8th, 1912, with a capital stock of $500,000, consisting of 5,000 shares of the par value of $100 a share, and was organized for the purpose of manufacturing, buying, selling, trading and dealing in and with motors and motor vehicles of all kinds, and any appliances, accessories, contrivances or parts pertaining thereto."

That is admitted by the defendant with the qualification that the $500,000 was the authorized capital stock of the company.

I will read paragraph four of the plaintiff's statement of claim:

"4. The names of the subscribers and the numbers of shares subscribed by each, as set forth in the application for letters patent for said corporation, are: Louis J. Bergdoll, 2,998 shares; E. Laurence Webster, 1 share; and Frank J. Fanning, 1 share; the said Bergdoll, Webster and Fanning were named in said application as directors of said company for the first year."

I will read paragraph five of the plaintiff's statement of claim:

"5. At the stockholders' meeting, held for the purpose of organization, the stockholders, then consisting of the said Bergdoll, Webster and Fanning, confirmed and approved the selection of the said Bergdoll, Webster and Fanning as directors for the first year, in accordance with the provisions of the application for the letters patent of said company, and thereupon said stockholders authorized the board of directors to issue capital stock of the company to the amount of

$500,000.00, and to accept in full or part payment of said stock cash [fol. 39] or property, as the said board should determine necessary for the business of the company.

I will read paragraph six of the plaintiff's statement of claim.

Mr. Gibbons: I must object to the reading of paragraph six.
Mr. Catharine: I am going to read the part that you admit.

Mr. Catharine read paragraph six, as follows:

"6. Subsequent to the incorporation of the said bankrupt company, and while said Bergdoll, Webster and Fanning were in control thereof as its board of directors, there were issued, on April 1st, 1912, 3,000 shares of the capital stock of the said bankrupt company of the par value of $300,000, endorsed 'full paid and non-assessable' as follows, to wit, to the said Louis J. Bergdoll, 2,998 shares; E. Laurence Webster, 1 share; and Frank J. Fanning, 1 share."

That is admitted by the defendant except that the stock was issued in the latter part of May, 1912, instead of the first of April, 1912.

I will read paragraph seven of the plaintiff's statement of claim:

"7. That the said E. Laurence Webster and the said Frank J. Fanning were the nominal holders only of the two shares of stock subscribed for and subsequently issued to them as aforesaid, and held said stock for and on account of the said Louis J. Bergdoll in the organization and conduct of the business of said corporation, and said [fol. 40] two shares of stock were finally disposed of by them without consideration therefor by direction of the said Bergdoll."

Paragraph eight is denied.

I will read paragraph nine of the plaintiff's statement of claim.

"9. From the date of the adjudication in bankruptcy, in April, 1913"——

Mr. Gibbons: I object to the reading of paragraph nine. We admit it to a certain point, but that is not involved in this issue.
The Court: Read just the sentence the truth of which is admitted.
Mr. Catharine: That is what I am about to do.

Mr. Catharine read paragraph nine, as follows:

"9. From the date of the adjudication in bankruptcy, in April, 1913, until late in 1917, the estate was involved in litigation covering amounts approximating $750,000; one of the cases being carried to the United States Supreme Court."

The balance of that paragraph is denied.

I will read paragraph ten of the plaintiff's statement of claim.

"10. On October 22, 1917, the trustee filed his petition for (1) an assessment upon 3,000 shares of stock issued as aforesaid, and (2)

for authority to institute proceedings for the collection of the amount of said assessment."

[fol. 41] Then there is a part denied, and then the concluding sentence of that paragraph is admitted, which reads:

"The Referee found inter alia as follows, and said findings are hereby averred as part of this statement of claim."

Then follow the findings of the Referee, which are admitted. In other words, the affidavit admits the Referee found as stated in the statement, but denies the truth of the allegations therein found. I will put the order in evidence instead of reading the balance of that paragraph.

The Court: Who were the parties to the record in which the report was filed by the Referee?

Mr. Catharine: These parties.

The Court: The same parties that are here?

Mr. Catharine: The same parties precisely.

Mr. Gibbons: If your Honor please, in that other case the defendant here did not appear as a defendant in the case but appeared as one of the creditors of the corporation. He has a dual capacity here, both as a creditor of the corporation and as a stockholder against whom an assessment is attempted to be made.

Mr. Catharine: He appeared in that proceeding as a stockholder, and he protested against the assessment on the stock owned by him. I will show that directly by his answer to the petition filed by the trustee.

I will read the balance of paragraph ten, which is as follows:

[fol. 42] "(a) On January 8th, 1913, the said 3,000 shares of stock, held as aforesaid by Bergdoll, Webster and Fanning, were assigned and transferred to Bergdoll's brothers, Erwin, Grover and Charles Bergdoll, under an agreement whereby Erwin Bergdoll undertook and agreed to manage and finance the bankrupt company.

(b) Between the date said company was adjudged bankrupt, to wit, April 13, 1913"——

Mr. Gibbons: If the Court please, that is denied. I object to it being read.

Mr. Catharine: I am reading what the Referee found.

Mr. Gibbons: I object to it.

(Objection overruled.)

(Exception noted for defendant, by direction of the Court.)

Mr. Catharine continued reading the balance of paragraph ten, as follows:

"(b) Between the date said company was adjudged bankrupt, to wit, April 13, 1913, and December, 1912, during which period Louis J. Bergdoll, E. Laurence Webster and Frank J. Fanning assigned and transferred said 3,000 shares of stock to Erwin R. Bergdoll, et

al., there was no material change in the financial condition of the said bankrupt company.

(c) When said transfers of stock were made in 1913"——

[fol. 43] Mr. Gibbons: I object to that also, if your Honor please, on the same ground.

(Objection overruled.)

(Exception noted for defendant, by direction of the Court.)

Mr. Catharine continued the reading of the balance of paragraph ten, as follows:

"(c) When said transfers of stock were made in 1913, said corporation was insolvent and unable to pay its many obligations, and all of the named parties to said transfers knew, or had the means within their own control of knowing, that the said company was insolvent, and that said stock when assigned was not full paid.

(d) The only consideration paid to the bankrupt company"——

Mr. Gibbons: I object to that also. It is expressly denied in the affidavit of defense.

The Court: He is reading, as I understand it, findings made by the Referee.

Mr. Gibbons: He avers it in the statement of claim, but it is denied categorically in the affidavit of defense. My client was not a party there in the same capacity as he is here.

(Objection overruled.)

(Exception noted for defendant, by direction of the Court.)

[fol. 44] Mr. Catharine continued reading the balance of paragraph ten, as follows:

"(d) The only consideration paid to the bankrupt company for said 3,000 shares of capital stock issued by said company to Louis J. Bergdoll, et al., amounted to $144,428.03, and that there remains due and unpaid on said stock the sum of $155,571.97, with interest thereon from April 1, 1912.

(e) No assessment was ever made by the bankrupt company for the amounts due and unpaid on said subscriptions."

I will read paragraph eleven of the plaintiff's statement of claim.

"11. On appeal to the United States District Court, the order of the Referee of May 20, 1918, was reversed pro forma November 12, 1918, and the matter was re-submitted to the Referee for further proceedings. On February 14, 1919, the Referee entered his final order making an assessment of .5185 per cent of the par value of said 3,000 shares of stock, to wit, the sum of $155,571.97, and interest thereon, in all amounting to $219,771.34, and further ordered and directed Bergdoll to pay the same. Said assessment and order of the Referee is hereto attached and made a part hereof, marked 'Exhibit A.' On July 1, 1919, said order and assessment were affirmed and confirmed by the United States District Court. Defendant thereupon took an appeal to the United States Circuit Court of

Appeals, argument was heard in January, 1920, and in March following, the decree of the District Court was reversed insofar as it determined the personal liability of the defendant, but insofar as said [fol. 45] decree adjudicated the necessity of an assessment on said 3,000 shares of stock, the rate thereof, and as to those prima facie subject to the assessment, said decree was affirmed, and the costs of the appeal were put upon the defendant herein."

Mr. Gibbons: If your Honor please, in view of the fact that he has read that part of the statement of claim I suggest he should read the affidavit of defense, which qualifies the admission.

The Court: You had better read the answer as it appears in the affidavit of defense.

Mr. Catharine: I will read the answer to paragraph eleven of the statement of claim. It reads as follows:

"11. The averments of paragraph 11 are admitted. The defendant, however, further says that all of their proceedings were made necessary by the action of the Referee, who, at the instance of the plaintiff, ordered and directed the defendant to pay the assessment made against it, which said order the said Referee had no power or authority to make under the facts or law. A copy of the opinion of the United States Circuit Court of Appeals reversing the decree of the District Court is attached hereto, made part hereof, and marked, 'Exhibit D'."

I will read paragraph twelve of the plaintiff's statement of claim.

"12. The plaintiff, having ascertained that the defendant had changed his name to Bergson, and that he was domiciled in New [fol. 46] York City, brought suit against the defendant in the U. S. District Court for the Eastern District of Pennsylvania. On May 16, 1921, defendant filed therein a plea to the jurisdiction and asked that the case be dismissed, supported by an affidavit, in effect, claiming to be a citizen of Pennsylvania and that he had been living only temporarily in New York City. By agreement of counsel, said case was discontinued of record July 13, 1921. The present suit was then brought."

GILBERT W. LUDWIG, having been duly sworn, was examined and testified as follows:

By Mr. Catharine:

Q. Where do you live?

A. 412 North 52nd Street.

Q. What is your employment?

A. I am deputy clerk of the United States District Court.

Q. Have you brought with you the record of the bankruptcy proceedings against the Louis J. Bergdoll Motor Company, No. 4742?

A. I have.

Q. Do you have the original records with you?

A. I have.
Q. Will you produce the order of the Referee?

(Papers produced by witness.)

Q. I hand you a paper taken from the records, and ask you to state what it is.
A. That is the certificate of the Referee for review by the Court.
[fol. 47] Q. The review of the decision made by the Referee?
A. Yes, sir.
Q. Among other papers there is the Referee's order made under the date of February 14th, 1919?
A. That is right.

Mr. Catharine: I offer in evidence the order of Referee Mellors made in this proceeding, under date of February 14th, 1919.
Mr. Gibbons: I object to that. First of all, this order has been overruled by the Circuit Court of Appeals. It was affirmed by the Court below and was overruled by the Circuit Court of Appeals. Secondly, the order pertained to a matter which was ex-parte and in which the defendant was not represented except insofar as his position as a stockholder and not as a debtor to the corporation, as he is in that position at the present time.
The Court: He is only a debtor to the corporation because he is a stockholder.
Mr. Gibbons: I mean at that time he was in the position of a creditor, and a large creditor, of the corporation as well as a stockholder.
The Court: Why do you burden us with the consideration of adjudications by Referees which have been torn up by the roots by the Court of Appeals?
Mr. Catharine: They have not, if your Honor please. This order of the Referee was reversed in part and affirmed in part. All I want to do is to get this order on the record. This order is the basis for making the assessment. It is the basis for the bringing of this suit.
[fol. 48] The Court: I understood you to say that the order had been reversed by the Court of Appeals so far as it levied moneys to be paid by the defendant in this case.
Mr. Catharine: Yes, sir. So far as it warranted the institution of proceedings for the collection of an amount found to be due it was affirmed.
The Court: You will have to offer in connection with this the order of the Circuit Court of Appeals.
Mr. Catharine: I am going to follow it right up with that.
The Court: Understanding that that order is to go in, I will let this go in evidence.

(Exception noted for defendant, by direction of the Court.)

Mr. Catharine: I direct the Court's attention particularly to that portion of the order which was not reversed, but it was affirmed by the Circuit Court of Appeals.

(For copy of the order just offered in evidence, see page 96).

By Mr. Catharine:

Q. Will you produce the mandate of the Circuit Court of Appeals in the matter of the Louis J. Bergdoll bankrupt estate, No. 2489.

(Mandate produced by the witness.)

[fol. 49] Mr. Catharine: I offer in evidence the mandate of the United States Circuit Court of Appeals for the Third Circuit to the District of the United States for the Eastern District of Pennsylvania in this proceeding, which provides:

"On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby reversed insofar as it fixes the personal liability of the appellant and the amount thereof, but affirmed insofar as it adjudicates the necessity for an assessment on the stock of the bankrupt and the rate thereof and as to those who appear prima facie subject to the assessment. The costs of this appeal to be borne by the appellant."

That is dated February 26th, 1920.

(For copy of mandate, see page 101.)

By Mr. Catharine:

Will you please produce the adjudication in bankruptcy?
A. Yes.

(Adjudication produced by the witness.)

Q. I now hand you a paper endorsed "Adjudication in bankruptcy," dated April 11, 1913, and ask whether that is the adjudication of the bankruptcy of the Louis J. Bergdoll Motor Company of Pennsylvania.
A. It is.

Mr. Gibbons: If your Honor please, some of these things have [fol. 50] already been admitted in the affidavit of defense. We admit the adjudication in bankruptcy.
Mr. Catharine: I offer in evidence the adjudication in bankruptcy dated April 11, 1913.
The Court: Things that are admitted do not have to be proved.
Mr. Catharine: There are some facts that appear in here that I will have to rely on later.

(For copy of adjudication, see page 103.)

By Mr. Catharine:

Q. Have you the schedule in bankruptcy?
A. Yes, sir.

(Schedule produced by the witness.)

Q. These papers I hand you, marked "Bankrupt's schedules" are the schedules filed in the proceeding, No. 4742?

A. Yes, sir.

Mr. Catharine: I offer in evidence the bankrupt's schedules in the matter of Louis J. Bergdoll Motor Company, bankrupt, No. 4742

(For copy of bankrupt schedules, see page 105.)

By Mr. Catharine:

Q. Will you produce the appraisement of the assets of the estate?

A. Yes.

[fol. 51] (Appraisement produced by the witness.)

Q. This paper is the report of the appraisers appointed by the District Court to make an appraisement of the assets of the bankrupt estate?

A. Yes, sir.

Mr. Catharine: I offer in evidence the appraisement made by the appraisers appointed by the District Court of the United States for the Eastern District of Pennsylvania in the matter of the Louis J. Bergdoll Motor Company, Bankrupt, No. 4742.

Mr. Gibbons: I object to the appraisement.

The Court: Is that pleaded in your statement of claim? Is it referred to in any way?

Mr. Catharine: It is referred to.

The Court: What is its relevancy?

Mr. Catharine: The purpose of it is to show the value of the estate coming into the hands of the receiver.

The Court: What has that got to do with it? The Court of Appeals have sustained the Referee's finding that an assessment was necessary, and that the amount he fixed was a proper one.

Mr. Catharine: This is offered on a point raised in the affidavit of defense, to wit, the application of the statute of limitations. What I am doing now is to meet that averment. In other words, to show the progress of the administration of this estate from the time it was taken charge of by Mr. Harrigan until this suit was brought.

[fol. 52] The Court: What has the appraisement got to do with that question?

Mr. Catharine: The point in the case is this: The defendant will contend as a matter of fact that if the difference between the assets and the liabilities of this concern exceeded the amount which was due by the defendant that the plaintiff should have instituted this proceeding immediately after the bankruptcy proceedings were begun. What I am doing now is to show the course of events which made it impossible for the plaintiff to institute the proceedings before he did.

The Court: I do not see how that tolls the bar of the statute of limitations, what you have just said.

Mr. Catharine: That is part of the proceedings. That is one of the things that was necessarily done during the period of the administration of the estate. The point that will be raised by the defendant is whether or not the plaintiff knew or should have known that the whole amount now claimed to be due by Bergdoll at the time of the inception of these bankruptcy proceedings was due. That is, as soon as the matter was taken in charge by him.

(Objection overruled.)
(Exception noted for defendant, by direction of the Court.)
(For copy of appraisement, see page 108.)

[fol. 53] By Mr. Catharine:

Q. Have you got with you the petition for the confirmation of the sale and the order thereon?
A. Yes, sir.

(Petition produced by the witness.)

Q. That is endorsed "Petition for confirmation of sale and order thereon?"
A. That is right.
Q. That is the order confirming the sale of the assets of the bankrupt company?
A. That is correct.

Mr. Catharine: I offer in evidence the petition for confirmation of sale and order thereon in the matter of the Louis J. Bergdoll Motor Company, alleged bankrupt, No. 4742.
Mr. Gibbons: I object to the admission in evidence of the petition for confirmation of sale and the order thereon.

(Objection overruled.)
(Exception noted for defendant, by direction of the Court.)
(For copy of petition and order, see page 110.)

By Mr. Catharine:

Q. I hand you a certified copy of the docket entries in this bankruptcy proceeding, which extend from March 17th, 1923, to May 25th, 1921. Is that a certified copy of the docket entries?
[fol. 54] A. Yes, sir.

Mr. Catharine: I offer in evidence the certified copy of the docket entries in the matter of Louis J. Bergdoll Motor Company, in bankruptcy, No. 4742.
Mr. Gibbons: I object to the admission in evidence of the docket entries.

(Objection overruled.)
(Exception noted for defendant, by direction of the Court.)
(For copy of docket entries, see page 113.)

By Mr. Catharine:

Q. I hand you a certified copy of the docket entries of the proceedings before the Referee of Harrigan against Erwin R. Bergdoll, which was involved in this litigation.

Mr. Gibbons: I object to that, if the Court please.

The Court: How does that have anything to do with this?

Mr. Catharine: It is simply a question of what the trustee was required to do during this time that intervened between his appointment as a trustee in bankruptcy and the final making of the order.

The Court: How does what he did as against one brother have any relation to his duties with respect to his claim against the other brother?

[fol. 55] Mr. Catharine: Except that that was one of the things. For instance, that involved a claim of nearly $32,000. That claim was not known anything about when the schedules were filed If it was a claim that was reduced to judgment, it would have augmented the asets by nearly $32,000, and it did do it because we did recover that amount of money. Then, on the other hand, the claimant filed a claim against the estate, and the Referee disallowed his claim, but later his decision was reversed by the District Court, and that claim was adjudicated, augmenting the amount of the liabilities. All of those questions involved the consideration of whether or not the situation was such that the trustee ought to have known that the assets of the estate were not sufficient to meet the creditor's claims, and therefore, being in excess of the amount due by Bergdoll, that this suit ought to have been brought against Bergdoll sooner than it was. All of these matters that I am pressing now are pertinent to that inquiry.

Mr. Gibbons: May I say a word to your Honor just in this connection? All these cases were decided in favor of the Referee. So that they helped to add to the assets and cut down the liabilities. Still, after they were all over, and everything was decided in their favor, they still found it necessary to make this assessment. Now, how they can conceive that that was a reason for holding up their claim against Mr. Bergson is beyond my conception, because they were finally all adjudicated in their favor and they still had to do so. They still had to bring this suit.

The Court: I will admit this evidence, so that the whole matter may be before the Court.

[fol. 56] (Objection overruled.)

(Exception noted for defendant, by direction of the Court.)

(For certified copy of docket entries, see page 123.)

Mr. Catharine: I also offer in evidence the docket entries of the late Referee Hunter, the Referee first appointed in this case, and the docket entries of Referee Joseph Mellors, the first beginning April 12th, 1913, and ending December 27th, 1915, and the second beginning January 24th, 1916, and ending August 13th, 1919.

(Offer objected to.)

(Objection overruled.)
(Exception noted for defendant, by direction of the Court.)
(For copy of docket entries, see page 125 et seq.)

By Mr. Catharine:

Q. Please produce the certificate of the Referee for review dated June 26th, 1918.

(Paper produced by the witness.)

Q. This paper I now show you is the certificate of the Referee for review dated June 26th, 1918?
A. That is correct.
Q. That record contains the petition for an order for an assess-
[fol. 57] ment upon capital stock and for leave to institute proceedings to recover unpaid subscriptions thereon?
A. It does, yes.

Mr. Catharine: I offer in evidence the petition filed by the trustee in bankruptcy on or about October 22nd, 1917, for an order for an assessment upon capital stock.

(Offer objected to.)
(Objection overruled.)
(Exception noted for defendant, by direction of the Court.)
(For copy of petition, see page 139.)

Mr. Catharine: I also offer in evidence the answer of the defendant, Louis J. Bergdoll, to the trustee's petition just offered in evidence, said answer being dated November 14th, 1917, wherein, among other things, the defendant asks that the said petition be dismissed.

(Offer objected to.)
(Objection overruled.)
(Exception noted for defendant, by direction of the Court.)
(For copy of answer, see page 144.)

Mr. Catharine: I also offer in evidence the answer of Louis J.
[fol. 58] Bergdoll, the defendant, dated October 30th, 1917, where, in paragraph 8, he asks that the said petition be dismissed.

(Offer objected to.)
(Objection overruled.)
(Exception noted for defendant, by direction of the Court.)
(For copy of answer, see page 148.)

Cross-examination.

By Mr. Gibbons:

Q. Do you have the ruling of Referee Hunter upon the petition upon the filing of proof of claim of Louis J. Bergdoll dated January 7th, 1915?
A. Yes.

(Paper produced by the witness.)

Q. That is the opinion of Mr. Hunter?
A. Yes; it is.
Q. This is on the matter of the claim of Louis J. Bergdoll for $395,860, is it not?
A. That is correct.

Mr. Gibbons: I ask that this opinion of Referee Hunter in the matter of the claim of Louis J. Bergdoll for $395,860, be marked for identification.

(Opinion marked, "Defendant's Exhibit No. 1 for identification, 2-14, 23, C. F. P.")

[fol. 59] By Mr. Gibbons:

Q. Can you tell by reference to your records whether or not this was ever appealed from?

Mr. Catharine: This is not cross-examination at all, but we will agree that it was never appealed from.

By Mr. Gibbons:

Q. Referring to your docket entries, will you tell me when the corporation was adjudicated a bankrupt?

The Court: The docket entries are in evidence. By looking at them one can gather the date of the adjudication.

Plaintiff rests.

(Counsel for the defendant moved for a non-suit.)
(Motion withdrawn.)
(At one o'clock P. M. court took a recess until 1.35 o'clock P. M.)

[fol. 60] 1.35 p. m.

Present: Parties as before noted.

Evidence on Behalf of the Defendant

Louis J. Bergson, having been duly sworn, was examined and testified as follows:

By Mr. Gibbons:

Q. Your name was Louis J. Bergdoll?
A. It was, yes, up until September 1st, 1919.
Q. You are the defendant in this case?
A. I am, yes, sir.
Q. In 1910 there was incorporated in New Jersey a corporation known as the Louis J. Bergdoll Motor Company? Is that correct?
A. Correct.

Q. At that time how many shares of capital stock of that corporation did you have?

A. There were $2,000 worth at par value subscribed and issued.

Q. In whose name were they subscribed at that time?

A. 18 in my name and 2 in two other names.

Q. And those other parties were your nominees, were they not?

A. Yes, sir.

Q. So that you practically owned all the capital stock?

A. Yes, sir. I owned the stock.

Q. There were only 20 shares issued?

[fol. 61] A. 20 shares.

Q. Where did that corporation do business?

A. At 31st and Dauphin and 16th and Callowhill Streets, Philadelphia.

Q. What line of business was it engaged in?

A. Automobile manufacturing.

Q. How long did it continue to do business?

A. That particular corporation?

Q. Yes.

A. Up until about the time of the incorporation of the Pennsylvania Company.

Q. Was it approximately April 11th, 1912?

A. Approximately.

Q. During that time did you or did you not advance money to the New Jersey Corporation?

A. I advanced four hundred and sixty——

By the Court:

Q. The question is did you or did you not?

A. Certainly.

By Mr. Gibbons:

Q. How much money did you advance to the New Jersey Corporation.

Mr. Catharine: That is objected to, because the matter is res adjudicata. He filed a claim against the bankrupt estate of the Pennsylvania Company for $395,000, alleging that he had——

The Court: He was asked what he advanced the New Jersey Company.

Mr. Catharine: I understand. He made that claim against the Pennsylvania Company because he was a creditor of the New Jersey [fol. 62] Company. He had a right to do that under the law. He had a right to do that because of the stipulation between counsel.

(Objection overruled.)

(Exception noted for plaintiff, by direction of the Court.)

A. I advanced four hundred and about sixty-eight thousand dollars from time to time.

By Mr. Gibbons:

Q. Did you receive anything from the New Jersey Corporation for that?

A. I received some assets back. So that I think at the time of the bankruptcy I had advanced a total of $310,000, according to the books.

Q. In other words, there was a balance due you from the New Jersey Corporation for money advanced in the sum of $310,000 at the time of the bankruptcy? Is that correct?

A. In total.

Q. How did you advance that money?

A. By check.

Q. Do you have the check there?

A. I have.

(Checks produced by the witness.)

Q. These checks are all drawn to the order of the Louis J. Bergdoll Motor Company?

A. Yes, sir.

Q. They total altogether $468,000?

A. Approximately $468,000.

[fol. 63] The Court: Until his statement is contradicted by somebody it is evidence, and the jury no doubt will accept it.

By Mr. Gibbons:

Q. When was the Pennsylvania Corporation formed?

A. In the spring of 1912.

Q. The charter was issued on March 18th, 1912?

A. About that time, I think.

Q. At the time that that was incorporated did you subscribe to some of the stock of the Pennsylvania Corporation?

A. I subscribed so far as the application for charter was concerned, yes.

Q. In the application for charter how much stock was subscribed for by you?

A. I think all but two shares. 2,998. Something like that.

Q. You mean the amount that was subscribed?

A. Yes, sir.

Q. 2,998?

A. Out of the $300,000 capital; not of the $500,000.

Q. In other words, the corporation was organized for $500,000?

A. Right.

Q. And there were $300,000 subscribed for?

A. Yes.

Q. Of which 2,998 shares were subscribed by you?

A. Yes.

Q. And 2 shares subscribed by your nominees? Is that correct?

A. I think so.

Q. What did you pay into the Pennsylvania Corporation for that? [fol. 64] A. I turned over my claim against the New Jersey Corporation.

By the Court:

Q. Did you pay any cash at all?
A. To the Pennsylvania Corporation?
Q. Yes. On that stock subscription.
A. No. Not five cents.
Q. You did not?
A. No.
Q. Wasn't it certified in the application that ten per cent of the stock subscribed had been paid for in cash?
A. Not by me.
Q. Didn't you sign the paper?
A. I did, but not that part of it.

By Mr. Gibbons:

Q. Do I understand you to say that you transferred to the Pennsylvania Corporation all your interest in the Jersey Corporation?
A. Yes, sir.

By the Court:

Q. What did you transfer exactly?
A. The good will and entire business.
Q. How did you transfer it? By handing it with your hands or by making a written document of transfer?
A. By instructing the bookkeeper to make the transfer.
Q. You did not give any written document of your interest?
[fol. 65] A. None other than the writing on the books.
Q. Did the New Jersey Corporation, by any official action, transfer is assets to the Pennsylvania Corporation?
A. By a resolution of the board of directors, do you mean?
Q. Any official action.
A. Not that I know of.
Q. Was there any resolution passed by the board of directors looking to the transfer of the assets of the New Jersey Corporation to the Pennsylvania Corporation?
A. Not to my knowledge, no.
Q. Did the Pennsylvania Corporation ever agree to accept in satisfaction of your stock subscription the assets of the New Jersey Corporation?
A. It did in its acts, in what was done.
Q. What acts do you refer to?
A. By taking the business over and conducting it.
Q. Was there any resolution of the board of directors passed to that effect?
A. I do not think so.

Q. Was this matter handled under the advice of counsel or did you do it by your own advice?
A. We had counsel, paid by the year.
Q. Did you ever say anything to him about this?
A. We did.
Q. Who was your counsel?
A. Arno P. Mowitz, Esq., at that time.

By Mr. Gibbons:

Q. You say you transferred to the Pennsylvania Corporation all your interest in the New Jersey Corporation?
A. Yes, sir.

[fol. 66] The Court: He transferred to the Pennsylvania corporation all his interest?
Mr. Gibbons: Yes, sir.

By the Court:

Q. What was your interest in the New Jersey Corporation? You were a creditor to the extent of three hundred and some thousand dollars, were you not?
A. Yes, sir.
Q. You were interested in the company as a creditor, were you not?
A. I was, yes, but that has not been sustained.
Q. Were you a stockholder also?
A. Yes, sir. I had eighteen shares.
Q. How did you transfer your claim against the New Jersey Corporation to the Pennsylvania Corporation?
A. By instructing the bookkeeper to make the transfer.
Q. But there was never any written assignment of the thing executed by you?
A. Not by me, no.
Q. How was your stock in the New Jersey Corporation transferred to the Pennsylvania Corporation?
A. By surrender.
Q. You don't transfer by surrender.
A. I just gave it up. It was cancelled.
Q. Gave what up?
A. The stock certificates.
Q. To whom did you give it up?
A. The bookkeeper, as far as I recollect. It was cancelled at that time.
Q. There was no transfer of the stock that you had in the New [fol. 67] Jersey Corporation to the Pennsylvania Corporation?
A. There was no transfer, no; not that I know of.
Q. You simply returned the certificates that you had for the eighteen or twenty shares of stock in the New Jersey Corporation without writing anything on the back of them?
A. Yes, sir; I think so.

Q. To the bookkeeper or clerk?
A. I think that was the way it was done.
Q. You know. I am simply asking you what the fact was.
A. It has been ten years, your Honor. I cannot be expected to remember all those things.
Q. Yes, you can be expected to remember, because you have advanced this as part of your defense, and we want to know just exactly the fact. The things that you set up as defense you ought to know about.
A. I do not know whether I signed that power of attorney on the back of that stock or not.

By Mr. Gibbons:

Q. Following your act in connection with that transfer, whatever it was, did or did not the Pennsylvania Corporation take over all the assets of the New Jersey Corporation?
A. It did.

By the Court:

Q. What assets did it take over?

By Mr. Gibbons:

Q. What assets were taken over?
A. Everything.

[fol. 68] By the Court:

Q. Just enumerate them. Let us see what those things were. Cows, horses, houses, wagons, or what?
A. It took over all the machinery, all the stock.
Q. What do you mean by "stock"? Do you mean shares of stock?
A. No. Material stock. Automobile parts. Parts and bodies, raw and finished. It took over the good will of the business. It took over the bank account. It took over everything.
Q. How much money was in bank at the time that the account was taken over?
A. The books will show.
Q. You ought to be able——
A. I cannot remember those figures for ten years.

By Mr. Gibbons:

Q. Where was the place of business located?
A. 31st and Dauphin and 16th and Callowhill Streets, Philadelphia.
Q. Let us take the place at 31st and Dauphin first. How much space was occupied by that plant?
A. There were two buildings there, making a total ground floor area of about 200 by 500 feet?
Q. What proportion of a city square was it?

A. It depends on the square.
Q. That particular square I am talking about.
A. 200 by 500 feet.
Q. Was it about half the total area of that square or block?
A. I would say it was a little over that.
Q. How many floors were there?
A. Part of it had a second floor, which was the general office of that [fol. 69] that plant. That was about fifty by two hundred and fifty. Something like that.
Q. Did you occupy the whole first floor?
A. We occupied the whole place.
Q. There was one entire plant, and then there was another part used as an office, the second floor? Is that correct?
A. Yes.
Q. In that was there any machinery or fixtures?
A. Most all the machine tools were in that plant.
Q. Do you know what the value of that particular part of the plant was?
A. About $70,000.
Q. That was the fixtures, you say?
A. That was the machinery and fixtures. Not the goods in the plant. Not the stock.
Q. In other words, you had in addition to that a lot of stock up there?
A. And there was a lot of stock in transit.
Q. Do you know what the value of the stock was?
A. I would not know off-hand.
Q. Did you buy and sell automobiles at that time, or automobile parts?
A. We bought parts and manufactured automobiles and sold the automobiles.
Q. Were you familiar with the values of the stock and fixtures carried by you?
A. Yes, sir; but I would not be familiar with the quantities that we carried.
Q. In other words, you do not know how much you had on hand at that time?
A. That would vary.
Q. How much stock was there on hand—do you know—at the time that the Pennsylvania Corporation took over the New Jersey Corporation's assets?
A. No. I would not be able to say.
[fol. 70] Q. What was there at the 16th Street place?
A. The 16th Street plant was a six story building, 100 by 180 feet.
Q. That was at 16th and Callowhill, was it?
A. Yes, sir.
Q. Was the whole building occupied?
A. No. The four upper floors were occupied.
Q. What was there in that building?
A. That was the assembling plant. We carried most of the finished stock and cars that were being assembled there.

Q. In other words, there were automobiles either fully assembled or in the course of being assembled in that particular place?

A. Yes, sir.

Q. Was that also a sales agency?

A. No. The company's general office was in that building.

Q. Was that equipped with office furniture and fixtures?

A. Oh, yes.

Q. Have you any idea how many automobile trucks or other motor vehicles there were at the time of the transfer?

A. No. I would not be able to say.

Q. Can you state, from your knowledge of the situation there, what was the value of the stock on hand up there?

A. Not with any exactness, because that varied from day to day.

Q. What in your estimation was the value of the stock on hand at that time?

Mr. Catharine: That is objected to unless the witness first shows that he knows what actually was there. He cannot, of course, guess at what it was.

[fol. 71] (Objection sustained.)

By Mr. Gibbons:

Q. Did you have supervision of the purchase of the stock that was on hand up there?

A. Oh, yes.

Q. Were you familiar with the values of the stock on hand, from your business dealings and the purchase and the sale of the articles?

A. Yes, sir. I knew what each part cost.

Q. What in your estimation was the value of that stock?

Mr. Catharine: That is objected to. He may give us the value of a given part of it, but he is asked to tell the value of the whole without detailing what was there. If he made an inventory himself and ascertained the number of parts, and so forth, of course he could give us that, but if he did not do that I take it he could not testify to that.

The Court: Was he personally familiar with what the contents of this establishment were?

Mr. Gibbons: He said he was familiar with the contents. He was there every day. He can give us an estimate of what in his opinion was the value.

(Objection sustained.)

By Mr. Gibbons:

Q. Can you approximate how many automobiles were on hand at the time the transfer was made?

[fol. 72] Mr. Catharine: That is objected to. I think he has got to do more than approximate it or guess at it. If he has an exact knowledge of the inventory of the things in the place at the time, of course he can testify to it, but he cannot guess at it. As a matter

of fact, what was required to be done to establish the value of these things as against the plaintiff was the making of an inventory, and the inventory was not taken.

The Court: I will admit the evidence subject to the objection, and give you an exception.

(Exception noted for plaintiff, by direction of the Court.)

By Mr. Gibbons:

Q. What in your opinion was the value of the stock on hand at the time of the transfer?

The Court: The reasonable market value.

A. At what date?

By Mr. Gibbons:

Q. At the time of the transfer of the assets of the New Jersey Corporation to the Pennsylvania Corporation.
A. That is only the tangible stock?
Q. Yes.
A. Including machinery?
Q. Yes.

By the Court:

Q. Is machinery stock?
A. No, sir. It is equipment.

[fol. 73] The Court: Leave that out.

A. I should say $200,000 in value.

By Mr. Gibbons:

Q. I understood you to say there were about $70,000 of machinery and fixtures?
A. In that one plant. Dauphin Street only.
Q. What other plants were there?
A. 16th and Callowhill.
Q. How much was the machinery and equipment there worth?
A. Including blue prints and plans and designs, and so forth?
Q. Everything that you have not already included.
A. At least $100,000 worth.
Q. Had the corporation engaged in any advertising up to that time?
A. Yes, sir. They spent something like $25,000, I should say off-hand.
Q. They expended that on advertising?
A. Yes, sir.
Q. How had that money been expended?
A. In display advertising in newspapers in different cities and in some magazines, I think, like Scribner's and Collier's.

Q. What was the name of the machine manufactured by that corporation?

A. Bergdoll 30 and 40, I think we designated them.

By Mr. Catharine:

Q. You assembled them? You did not manufacture them?

A. We manufactured some parts. We manufactured motors and transmissions.

[fol. 74] By the Court:

Q. I thought you had a suit about some motors that were manufactured by a concern out in Pittsburgh?

A. We did not manufacture those that Westinghouse manufactured for us.

By Mr. Gibbons:

Q. What in your estimation was the total value of the assets transferred?

A. The business as a whole?

Q. Yes.

A. About $500,000.

Q. You either owned or controlled all the capital stock that was issued in the New Jersey Corporation?

A. There were only $2,000 worth issued. I owned 18 shares and had two others which I owned in nominees' names.

Q. It was under your assent that the Pennsylvania Corporation got all the assets that they ever did get? Is that correct?

A. Yes, sir.

Q. So that all the assets the Pennsylvania Corporation ever did get were the assets of the former New Jersey Corporation?

A. Yes, sir; and that is all the liabilities it ever got.

Q. And all the liabilities were the liabilities of the New Jersey Corporation?

A. Yes. Continuing contracts.

(It is agreed by and between counsel for the respective parties that [fol. 75] there was a stipulation filed of record in the bankruptcy proceeding of the Louis J. Bergdoll Motor Company, No. 4742, that all of the debts provable against the New Jersey Company might be proved against the bankruptcy estate.)

By Mr. Gibbons:

Q. In accordance with that stipulation did you present before Referee Hunter, the Referee appointed in this case——

A. Mr. Harrigan made the allegation that he was going to make me pay every dollar of debt.

Mr. Catharine: I ask that that be stricken out as not responsive.

(Motion sustained.)

By Mr. Gibbons:

Q. Did you file a claim against the Louis J. Bergdoll Motor Company?
A. I was forced to, yes.

By the Court:

Q. Yes or no.
A. Yes.

By Mr. Gibbons:

Q. You filed a claim against the Bergdoll Motor Company for $390,000?
A. $395,000.
Q. And that was adjudicated by the Referee, was it not?
[fol. 76] A. Referee Hunter, in an opinion filed January 7th, 1915.

Mr. Gibbons: If your Honor please, I offer in evidence the record of this particular claim of Louis J. Bergdoll against the Louis J. Bergdoll Motor Company, amounting to $395,000, and particularly call the attention of the Court to the opinion of Referee Hunter as to that claim.

(For claim of Louis J. Bergdoll against the Louis J. Bergdoll Motor Co., for $395,000, see page 151.)

By Mr. Gibbons:

Q. Did you ever get any money out of this corporation? Did you ever receive back from the corporation any money at all?
A. No. Not a cent of pay or anything else.

Cross-examination.

By Mr. Catharine:

Q. Mr. Mowitz was your attorney?
A. The company's attorney.
Q. You are also an attorney?
A. Not at that time.
Q. When were you admitted to the bar?
A. I was admitted to the bar before his Honor I think about 1914.
Q. I hand you the application of the Louis J. Bergdoll Motor Company for a charter, dated March 15, 1912, and ask whether or not that is your signature to the application, "Louis J. Bergdoll, 2205 Green Street, Philadelphia."
[fol. 77] A. I think I swore to that.
Q. Is that your signature? It is the application for the charter?
A. That don't look like my handwriting up there. This is my signature here (indicating).
Q. This is your signature?
A. Yes, sir.

Q. This you say don't look your signature (indicating).
A. Look at it, and look at the other one.
Q. You signed here, then, down at the left-hand corner "Louis J. Bergdoll"?
A. Yes, sir.
Q. And it is signed "E. Laurence Webster" and "Frank J. Fanning"?
A. Yes, sir.
Q. And that certificate was sworn to before a notary public by E. Laurence Webster and Frank J. Fanning?
A. I don't know, but it speaks for itself.
Q. Your name was in the jurat and then crossed out.
A. You mean I signed my name in there?
Q. I say it was in the jurat and crossed out.

Mr. Gibbons: That speaks for itself.

By Mr. Catharine:

Q. That is right, is it not?
A. No. I don't know about that having been there.
Q. Look at it and see if it is not written in and then crossed out.
A. When?
Q. I don't know.
[fol. 78] A. Neither do I.
Q. It was written in this certificate and then crossed out, was it not?
A. Yes; but it is not signed by me.
Q. It was not signed, but the other two signed it. That is, they made the oath to the truth of the facts stated in here?
A. Yes. They probably did.
Q. In that certificate it is averred that, "The amount of the capital stock of said corporation is $500,000, divided into 5,000 shares of the par value of $100, and $50,000, being ten per cent of the capital stock, has been paid in cash to the treasurer of said corporation." I want to ask you whether it is true that there were $50,000 paid to the treasurer of the corporation at the time that certificate was presented to the authorities at Harrisburg.

Mr. Gibbons: Before he answers that I would like to ask if he was the treasurer.

By Mr. Gibbons:

Q. Were you the treasurer of the corporation at that time?
A. No.
Mr. Gibbons: Then, just answer for yourself. He asked you if you knew whether or not a certain amount of money had been paid into the treasury.

By Mr. Catharine:

Q. I ask you whether or not it was true that $50,000 had been paid into the treasury of the corporation, as averred according to that statement?

[fol. 79] A. According to that statement, it is true.

Q. I am asking you whether——

A. Did I see the money?

Q. I am asking you whether as a matter of fact $50,000 were paid over to E. Laurence Webster, as the treasurer of that corporation, as stated in that certificate?

A. Mr. Webster said so. I do not know by having seen the $50,000 or having seen it paid in.

Q. Did you pay any portion of that $50,000?

A. Of that $50,000?

Q. Of this $50,000.

A. I testified a minute ago that I did not pay a cent to the Pennsylvania corporation.

Q. Do you know of anybody who did pay $50,000 into the treasury of the Corporation?

A. Do I know of anybody?

Q. Yes.

A. No; I don't think so.

(At Mr. Catharine's request, the application for charter of the Louis J. Bergdoll Motor Company is marked, "Plaintiff's Exhibit A for identification.")

Q. You have said that the assets of the New Jersey Company were transferred to the Pennsylvania Company, and among that which was transferred was a claim of yours of $300,000 or $310,000 against the New Jersey Company.

A. If it is so I testified to it.

Q. I say you said that.

A. If it is. You are making the statement.

Q. Didn't you say a little while ago——

A. I am not going to deny what I just said.

Q. Then, it is true that you did say that——

A. Did you hear it?

[fol. 80] The Court: You are a member of the bar. You know what the proprieties are as to the behavior of witnesses. Conform yourself to that rule. Answer the questions that are put to you. Do not argue with the lawyers.

By Mr. Catharine:

Q. You have testified that the assets of the New Jersey Company, together with your claim against that company of $300,000 or $310,000, were transferred to the Pennsylvania Company, and for that consideration 2,998 shares of stock of the Pennsylvania Company were issued to you. That is true, is it not?

A. I did not testify that that stock was issued to me, no, I don't think. Not the Pennsylvania Company's stock.

Q. Was it issued to you?

A. Was the Pennsylvania Company's stock issued?

Q. Yes.

A. Twenty-nine hundred and some shares were issued.

Q. 2,998 issued.

A. I know, but I did not testify to them.

Q. Didn't you testify here that 2,998 shares were issued to you?

A. Yes.

Q. You signed the stock certificate that gave you the 2,998 shares? You signed it as president of the company?

A. Yes; I think I did.

Q. Is it not true that soon after the adjudication in bankruptcy you, as the president of the New Jersey Company, went into court [fol. 81] with a petition in which you averred that all of the assets in charge of the bankruptcy court were not the assets of the Pennsylvania Company but belonged to the New Jersey Company, and therefore you wanted the possession of them delivered to the New Jersey Company?

A. I did that, to test the title, under the advice of counsel. I did.

Q. In the petition you said that, "Your petitioner avers that the said property so advertised to be sold by the said Frank A. Harrigan, receiver, as aforesaid, is not the property of the said Pennsylvania Corporation but is the property of your petitioner, the New Jersey Corporation."

A. Yes. That was to determine the title.

Q. That question was determined against the New Jersey Company, the Court holding, on appeal from the Referee to the District Court, that the property belonged to the Pennsylvania Company? Isn't that so?

A. That there was an actual transfer.

Q. I say the Court held that?

A. Yes. That the Pennsylvania Company held title to all those assets.

(At Mr. Catharine's request, the petition referred to is marked, "Plaintiff's Exhibit B for identification.")

Q. Have you any recollection now of the items which went to make up the assets transferred by the New Jersey Company to the Pennsylvania Company in May, 1912?

A. Any recollection of the items?

Q. Yes. The items that went to make them up.

A. Do you mean the book entries?

[fol. 82] Q. I mean the actual things that were transferred by way of cash, stock, machinery, tools, equipment, accounts, and so forth. Have you any recollection of that at all?

A. Just as much as I have testified.

Q. You have testified that the transfer was made by your direction upon the books of the company?

A. Yes.

Q. I want to call your attention to the entry in the books.

Mr. Gibbons: Before you call his attention to the entries, may I ask whether or not he made those entries?

Mr. Catharine: He said they were made by his direction.

By Mr. Gibbons:

Q. Were those entries made by your direction?

A. I don't know about those entries.

By Mr. Catharine:

Q. Look at them. You stated that the bookkeeper made certain entries and made the transfer, and I want to ask now whether you know whether page 61 of this book, which is marked "Exhibit N, 11-15-17, J. M., Referee," correctly states the assets transferred to the Pennsylvania Company by the New Jersey Company in May, 1912.

A. I do not know. I cannot tell from this.

Q. Have you any information at all, or any data, by which you can determine the items of the assets that were transferred to the Pennsylvania Company at that time?

[fol. 83] A. No. Not now. The receiver got all of the papers and records. I haven't got a thing.

Q. Have you any data which will show the amount of the liabilities transferred from the New Jersey Company and assumed by the Pennsylvania Company at that time?

A. No. I haven't got any data. The receiver got all that. How could I have any data?

Q. This is one of the books of your company, is it not?

A. I would not want to swear that it is. I don't know what has been done with it in ten years.

Q. I say this is one of the books of your company?

A. I won't swear to it.

Q. At the time of the transfer of these assets to the Pennsylvania Company was there any appraisement made by direction of the Pennsylvania Company directorate?

A. If you talk about the Pennsylvania Company, and you are referring to a resolution of the board of directors, I would say no.

Q. I am not speaking now of a resolution of the board regarding the transfer of these things from the New Jersey Company to the Pennsylvania Company, but what I want to know is whether or not any appraisement was made by the directors of the Pennsylvania Company at the time the transfer was made.

A. I do not know of any.

Q. At the time that the transfer was made you were president of the New Jersey Company?

A I think so.

Q. Don't you know that you were?

A. A day or two might make a difference.

Q. Who was associated with you in that company?

[fol. 84] A. Mr. Fanning and Mr. Webster.

Q. They each owned one share of the stock?

A. Yes.

Q. Who was president of the Pennsylvania Company at that time?

A. I think I was.

Q. Don't you know that you were?

A. So far as I know, yes.

Q. You owned 2998 shares of the stock?

A. I think I have testified to that.

Q. And Mr. Fanning owned one share and Mr. Webster owned one share?

A. They did not own them. They had them in their names.

Q. You owned them but they held them in their names?

A. Yes, sir.

Q. Do you say that the stock certificates issued to you by the New Jersey Company had been cancelled at that time?

A. I don't know just what you mean by "cancelled."

Q. What I mean is that they had been cancelled and surrendered and that you no longer had any interest in the stock of the New Jersey Company. That is, by any record that was made on the books of the New Jersey company.

A. Not after I received the Pennsylvania Company's stock. I had no longer an interest in it.

Q. But my question was directed to whether or not the stock issued by the New Jersey Company had been surrendered to that company and had been cancelled?

A. What do you mean by that? What acts do you mean by that?

Q. I mean did you take the stock certificates that had been issued [fol. 85] to you for 18 shares of stock and hand them back to the New Jersey Company, to the treasurer?

A. I don't think I did that.

Q. You did not do anything of the kind?

A. I don't think I did that.

Q. As a matter of fact, haven't you still got that stock somewhere, the certificate for 18 shares of stock?

A. Not that I know of.

Q. Do you know where it is?

A. No.

Q. Don't the books of the New Jersey Company still show that you are a stockholder with 18 shares of stock of that company?

A. If they do I should like to see them. I don't know.

Q. Have you got the stock certificate book of the New Jersey Company?

A. Have I?

Q. Yes.

A. No.

Q. Have you any books belonging to the company?

A. No.

Q. Haven't you books, three or four books, which I delivered to your counsel with the stipulation that they were to be returned to me, and haven't I failed to get them?

A. Have I any of those books? No; I have not.

The Court: I do not think we are interested in that question. That has nothing to do with this case.

By Mr. Catharine:

Q. In this claim that was presented by you for $395,860, presented [fol. 86] by you to the Referee, in that proceeding did you not claim as a creditor of the New Jersey Company long after this transaction assigning the estate to the Pennsylvania Company?

A. Will you allow me to explain why I had to do that?

The Court: Answer the question.

By Mr. Catharine:

Q. Just answer yes or no whether you did make claim against the——

A. Whether I filed that claim?

Q. Yes.

A. Yes. I filed that claim. I had to.

Q. As a creditor of the New Jersey Company?

A. Why, yes. I had to file that claim. If I did not do it within a year I would be outlawed.

Q. The result of that proceeding was that the Referee held that you were not entitled to a credit of $300,000 against the New Jersey Company, but that you were entitled to a credit of $10,000?

A. No; he did not. If you will let me see the opinion I will tell you what he decided.

Mr. Gibbons: If your Honor please, here is a question on a matter of a court record which is already in evidence.

By Mr. Catharine:

Q. You say the Referee did not decide in that case that you were not a creditor of the New Jersey Company to the extent of $395,000?

A. He decided that I was entitled to a credit on account of capital stock to the extent of $300,000.

[fol. 87] Q. In other words, he found that the money which you were claiming as a loan to this company had been paid by you to the company as a contribution to the capital stock?

A. Yes, sir; and that I got the Pennsylvania stock for it.

Q. He did not find that.

A. He did. He said so.

By Mr. Catharine:

Q. Will you state the items, and give the value of each of the items, which go to make up your estimate of the value of the assets transferred as $500,000?

A. That is based on my opinion.

Q. Just on your opinion?

A. That is all you can base it on. I haven't got an inventory.

Q. Without having any facts at all to base it upon—that is, no data at all?

A. I had a lot of experience to base it on.

Q. A lot of experience, and that is all? Just upon your opinion?

A. And the fact that I was around the place every day and knew the amount of output and the general run of product.

Q. Haven't you testified that you were not familiar with what was going on at the company by reason of your long absence and illness, and that you could not keep in touch, and that it was in consequence of that that this thing went to the bad?

A. It was sometime after the transfer that my illness got severe.

Q. I would like to know now, if you will tell us, whether you have any data at all upon which you can base your opinion?

[fol. 88] A. I told you that the receiver got all the data in the place.

Q. I understand, but what I want to get at is upon what do you base your opinion that these assets were worth $500,000?

A. Upon the fact of the amount of things that were bought.

Q. You mean because of the money that you had put into the thing?

A. No. We had contracts, specific contracts, and quantities of goods were coming in at certain rates.

Q. Are you familiar with the amount of stock, the different parts, automobiles and so forth, that you had in that place in May of 1912?

A. I haven't got an inventory in mind. I cannot say to a dollar or a thousand dollars, but I can only approximate it.

Q. You approximate it and base it altogether on your opinion? Is that right?

A. And my actual contact with the business.

Q. Let us see what you know about the number of machines that you had on hand in May of 1912?

A. Do you expect me to remember for ten years how many parts in a certain department there were up there?

Q. Yes. How many chasses did you have on hand at that time?

A. How many chasses?

Q. Yes.

A. Completely assembled?

Q. Completely assembled or not.

A. Very few completely assembled, because they were coming there in a semi-finished state, and they would go out as soon as they were finished.

Q. How many did you have completed and how many did you have in a semi-finished state?

[fol. 89] A. We would have on the average of——

Q. Not what you have on the average. What you had at that time.

A. On that day?

Q. Yes. At that time.

A. I could not recollect on that day.

Q. What number of wheels did you have at that time?

A. I think we had something like five or six hundred sets at a time.

Q. I understand, but I am talking now about the 31st day of May, 1912, when this transfer was made.

A. We had something like four or five hundred frames in the plant, that I knew of.

Q. Four or five hundred frames?

A. Yes; and probably more.

Q. How many motors did you have, of your own knowledge, at that time?

A. What date?

Q. May 31st, 1912.

A. At the time of the transfer?

Q. Yes.

A. We did not have them all at the plant. We had a good many at the Westinghouse plant.

Q. Whatever was transferred at that time appeared in the books of the company? Isn't that true?

A. Some of it did.

Q. What part of it did not appear?

A. What was covered by the account called the adjustment account, that did not appear. The adjustment. It was never adjusted.

Q. It was never adjusted?

A. That was the bookkeeper's way of getting out of going to the trouble to adjust it. A quick way of doing it.

[fol. 90] Q. So that everything, then, excepting the adjustment account was included in this statement in the books?

A. That appears to be correct.

Defendant closes.

Evidence in Rebuttal on Behalf of the Plaintiff

Mr. Catharine: I offer in evidence the record of the reclamation proceedings in the bankruptcy estate of Louis J. Bergdoll Motor Company. No. 4742.

Mr. Gibbons: I object to the offer of the record of the reclamation proceedings.

(Objection overruled.)
(Exception noted for defendant, by direction of the Court.)
(For reclamation proceedings, see page 173.)

Frank A. Harrigan, having been duly sworn, was examined and testified as follows:

By Mr. Catharine:

Q. You are the trustee of the bankrupt estate of the Louis J. Bergdoll Motor Company of Pennsylvania?

[fol. 91] A. I am.

Q. You were appointed in 1913?
A. Yes.
Q. Under your appointment did you take charge of the plant and the assets of the Pennsylvania Company?
A. I did, and its books.
Q. And the books of the company?
A. Yes, sir.
Q. I show you a book that is marked, "Exhibit N, 11-15-1917, J. M. Referee," and ask you to state whether or not that is one of the books which came into your possession as the receiver of the Estate of the Louis J. Bergdoll Motor Company of Pennsylvania?
A. Yes.
Q. Has that book been used in evidence in these proceedings from time to time before the several referees?

Mr. Gibbons: That is objected to.

(Objection sustained.)

By Mr. Catharine:

Q. This is one of the books that came into your possession?
A. This is the ledger of the Louis J. Bergdoll Motor Company, and it came into my possession at the time I took charge of the assets as receiver, and it has been in my possession ever since.

By the Court:

Q. Has the defendant ever stated that that was one of the books [fol. 92] of the Louis J. Bergdoll Motor Company?
A. I do not know that he has.
Q. You have not heard him say so?
A. No; I have not heard him say so.

(No cross-examination.)

Mr. Catharine: I offer in evidence the application for charter, and the certificate annexed thereto, of the Louis J. Bergdoll Motor Company of Pennsylvania.

Testimony closed.

(Adjourned until Thursday, February 15th, 1923, at 10 A. M.)

[fol. 93] IN COURT OF COMMON PLEAS

CHARGE OF THE COURT TO JURY—February 15th, 1923

Present: Parties as before.

AUDENRIED, P. J.:

GENTLEMEN OF THE JURY: I have gone over the case which you are sworn to try with a good deal of care. In my opinion, its dis-

position depends on matters of law. The case, in my judgment, presents no question of fact on which a verdict is necessary. Under the law as I understand it as applied to the facts which appear of record, about which there neither is nor can be any dispute, the plaintiff is entitled to recover a verdict here for the amount of his claim, $155,571.97, with interest from the 14th of February, 1919, up to the present time. The calculation of that interest account has been prepared by counsel, and they have fixed its amount at $37,-337.27. If that calculation is correct, the verdict to be rendered in favor of the plaintiff against the defendant would be $192,909.24.

Is there any dispute as to the accuracy of the interest calculation?

Mr. Catharine: No, sir.

Mr. Gibbons: As to the mathematical calculation, there is no dispute.

[fol. 94] The Court: Gentlemen, you have heard the parties, they agree that this interest calculation is correct if it runs from the date from which, under my ruling, the interest ought to be computed. Therefore, you will render your verdict for the plaintiff in the sum of $192,909.24. If I am wrong in my view of the law in this case, it will be corrected by the Court en banc, on proper motion.

The defendant's points are refused, so far as they are inconsistent with what I have said.

Exception noted for defendant by direction of the Court to the refusal of the learned Judge to charge as requested in the points presented by defendant's counsel as follows:

1. If you find from the evidence that the defendant, Louis J. Bergson, paid in full for the stock of the bankrupt company, your verdict must be for the defendant.

2. If you find from the evidence that the true value of the assets of the New Jersey Corporation at the time it was taken over by the Pennsylvania Corporation was in excess — $300,000, your verdict must be for the defendant.

3. Referee Richard S. Hunter having found that the sum of $300,000 was contributed by Louis J. Bergdoll to the capital stock of the New Jersey Company, and that the stock of the Pennsylvania Company which took over its assets and liabilities thereby became fully paid, and the said order having not been appealed from became final, and the said stock having been fully paid, your verdict must be for the defendant.

4. The present suit was not brought within six years from the [fol. 95] date of the adjudication of the Louis J. Bergdoll Motor Company, a bankrupt, and the suit is therefore barred by the statute of limitations and your verdict must be for the defendant.

5. Under all the evidence, your verdict must be for the defendant.

(Exception noted for defendant by direction of the Court to the charge of the learned Judge.)

Plaintiff's counsel requested the learned Judge to direct the stenographer to reduce the notes of testimony and charge, together with the points presented by defendant's counsel, and the answers thereto, to typewriting and file the same of record in the cause, which request was granted and the stenographer so directed.

(The jury rendered a verdict for the plaintiff for $192,909.24.)

[fol. 96] **Exhibit in Evidence**

Appendix

Order of Referee Mellors, under Date of February 14, 1919, Offered in Evidence on Behalf of the Plaintiff at Page 47

"In the District Court of the United States for the Eastern District of Pennsylvania

Cause No. 4742

In the Matter of Louis J. Bergdoll Motor Company, Bankrupt

Order of Referee

I, Joseph Mellors, Referee to whom the above matter was referred, filed my report in the above case on June 26th, 1918, wherein inter alia I found as conclusions of law (Vide conclusion of law 12) that the Trustee is entitled to an order for an assessment of 55% of the par value of 3,000 shares of stock issued by the bankrupt Company to Louis J. Bergdoll April 1, 1912, and (Vide conclusion of law 10) that the said Louis J. Bergdoll is liable for the total amount assessed against said 3,000 shares of stock with interest thereon from April 1, 1912. On May 20, 1918, an order was entered by the Referee making an assessment upon the said Louis J. Bergdoll for 55% of the par value of said 3,000 shares of stock with interest [fol. 97] from April 1, 1900, and further that said Trustee proceed forthwith to collect from said Louis J. Bergdoll the amount of said assessment. On June 26th, 1918, the Trustee incorporated in said order the following: 'And it is further ordered, that in accordance with said assessment the said Louis J. Bergdoll shall pay the Trustee the amount thereof with interest from April 1, 1912, to wit, the sum of $212,874.21.' Notice of said amendment of said order was duly served upon counsel for Bergdoll on June 26th, 1918. Bergdoll filed his petition for a review of said order as originally made May 20, 1918, but did not file a petition for review of said order as amended. On hearing in the District Court, counsel for Bergdoll contended that said original order had been amended by the Referee without warrant or authority. Dickinson, Judge, by opinion filed, granted leave to said Bergdoll to file a petition for review of

the amended order, and upon the theory that both petitions were then duly before the Court, allowed the same, disapproved and reversed pro forma both the orders made by the Referee, and remitted the cause to the Referee for further proceedings.

After full consideration, the Referee has concluded to enter the following:

Order

And now, to wit: This 14th day of February, 1919, the trustee herein having filed October 22, 1917, a petition in this cause having as its object the levying of an assessment upon 3,000 shares of capital stock of said bankrupt corporation, issued April 1, 1912, for an inadequate consideration, as follows: To Louis J. Bergdoll 2,998 shares, to E. Laurence Webster one share, and to Frank J. Fanning, [fol. 98] one share, in order to raise sufficient monies to pay the debts of the bankrupt company and the costs of administration; and an order to show cause allowed by this Referee on October 24, 1917, upon the filing of the aforementioned petition, having been served personally upon the said Louis J. Bergdoll, E. Laurance Webster and Frank J. Fanning, and upon the following persons to whom said stock was subsequently transferred prior to said company having been adjudged a bankrupt; Erwin R. Bergdoll, Charles A. Brawn (formerly known as Charles A. Bergdoll), Emma C. Bergdoll, Joseph M. Hubert, William Ruhland; and upon Grover C. A. Bergdoll by delivering a copy thereof to an adult member of his family at his home address in Philadelphia.

And this cause having come on to be heard before Joseph Mellors, one of the Referees in Bankruptcy, of this court, in the presence of Joseph W. Catharine, Esq., solicitor for said petitioning Trustee; Frank A. Harrigan, Trustee, Louis J. Bergdoll, E. Laurence Webster, Frank J. Fanning, Emma C. Bergdoll, Charles A. Brawn and William Ruhland; and where as the said Louis J. Bergdoll filed an answer to said petition wherein he controverted the right of said Trustee to make an assessment upon said stock, and further contested and denied that he was individually or otherwise liable to assessment for the amount claimed to be due upon said stock; and whereas proofs having been heard and briefs on behalf of the petitioning trustee and the said Louis J. Bergdoll having been submitted; and the opinion of Joseph Mellors, Referee, having been filed wherein and whereby he found that said 3,000 shares of the capital stock of the said bankrupt company of the par value of $300,000 were issued April 1, 1912, for an inadequate consideration as follows, to wit, to Louis [fol. 99] J. Bergdoll, 2,998 shares, to E. Laurence Webster, one share and to Frank J. Fanning, one share, that the whole amount paid for said 300 shares of stock was $144,428.03, which was contributed by the said Louis J. Bergdoll; that the said E. Laurence Webster and the said Frank J. Fanning paid no consideration for the two shares of stock issued to them and were merely the nominal holders thereof for the sole benefit of the said Louis J. Bergdoll in the

organization and conduct of the business of the said bankrupt company; that on January 8, 1913, all of said 3,000 shares of stock, pursuant to an agreement entered into between the said Louis J. Bergdoll and Erwin R. Bergdoll were assigned and transferred by the said Louis J. Bergdoll, E. Laurence Webster and Frank J. Fanning, as follows: to Erwin R. Bergdoll, 2,998 shares, to Charles A. Bergdoll one share, to Grover C. A. Bergdoll, one share that at the time said 3,000 shares of stock were transferred by the said Louis J. Bergdoll, E. Laurence Webster and Frank J. Fanning to Erwin R. Bergdoll et al., said bankrupt company was insolvent, and there was due upon said stock the difference between the amount paid for it, to wit, $144,428.03, and its par value of $300,000 to wit, the sum of $155,571.97; that on March 5, 1913, the said two certificates of stock theretofore issued to Charles A. Bergdoll and Grover C. A. Bergdoll, were transferred and assigned by them to the said Erwin R. Bergdoll; that on March 6, 1913, the said Erwin R. Bergdoll transferred said 3,000 shares of stock without any consideration being paid therefor, as follows: to Emma C. Bergdoll 2,997 shares, to Joseph M. Hubert, one share, to E. J. Teague one share and to William Ruhland one share; that at the time the said bankrupt company was adjudicated a bankrupt, said 3,000 shares of stock were [fol. 100] registered on the books of said company in the names of the said Emma C. Bergdoll, Joseph M. Hubert, E. J. Teague and William Ruhland, in the amounts above stated.

And said Referee having further found, in his opinion filed in this cause, that the corporate assets of said bankrupt company are insufficient to meet the corporate debts and that the said stock was issued to the original holders thereof, to wit, Louis J. Bergdoll, to E. Laurence Webster, and Frank J. Fanning, to the number of shares herein above set out, without the company having received an adequate consideration from said stockholders or from any one acting on their behalf, or from any person or persons whatsoever; and that the said Trustee is entitled to the relief asked for in said petition, and that an order be entered for an assessment of 55% of the par value of the said 3,000 shares of the capital stock of the said bankrupt company, to be levied upon the said stock. And it further appearing that said assessment should be for .5185% instead of 55%.

It is therefore on this 14th day of February, 1919, upon motion of Joseph W. Catharine, solicitor for said petitioning Trustee, ordered, adjudged and decreed that the said Louis J. Bergdoll be and hereby is assessed for .5185% of the par value of the said 3,000 shares of capital stock of said bankrupt company, to wit, the sum of $155,571.97, with interest thereon from April 1, 1912.

And it is further ordered, that in accordance with said assessment the said Louis J. Bergdoll shall pay to the Trustee the amount thereof, with interest from April 1, 1912, to wit, the sum of $219,771.34.

And it is further ordered, that said Trustee proceed forthwith to [fol. 101] collect from the said Louis J. Bergdoll the amount of said assessment herein above levied.

Joseph Mellors, Referee."

Mandate from United States Circuit Court of Appeals

Mandate of the United States Circuit Court of Appeals, 3rd Circuit, Offered in Evidence on Behalf of the Plaintiff at Page 49

"United States of America, ss:

(Seal U. S. Circuit Ct. of Appeals, 3rd District.)

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania, Greeting:

Whereas, lately in the District Court of the United States for the Eastern District of Pennsylvania, before you or some of you, in a cause between Louis J. Bergdoll, Petitioner-Appellant, and Frank A. Harrigan, Trustee of the Estate of Louis J. Bergdoll Motor Company, a Bankrupt, Respondent-Appellee, a decree was entered in the said District Court on the first day of July, 1919, which decree is of record in the office of the Clerk of said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of an appeal agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

[fol. 102] And whereas, in the term of October, in the year of our Lord one thousand nine hundred and nineteen, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby reversed in so far as it fixes the personal liability of the appellant and the amount thereof, but affirmed in so far as it adjudicates the necessity for an assessment on the stock of the bankrupt and the rate thereof and as to those who appear prima facie subject to the assessment. The cost of this appeal to be borne by the appellant.

Philadelphia, February 26, 1920.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal nothwithstanding.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the twenty-seventh day of March, in the year of our Lord one thousand nine hundred and twenty (1920).

Costs of Clerk ..... $.....
Printing Record ....
Attorney ....

$.....

Saunders Lewis, Jr., Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

[fol. 103] Endorsed: Cause No. 4742. Original File No. 2489. U. S. Circuit Court of Appeals, Third Circuit. No. 27, October Term, 1918. Louis J. Bergdoll, Petitioner-Appellant, vs. Frank A. Harrigan, Trustee of the Estate of Louis J. Bergdoll Motor Co., a Bankrupt, Respondent-Appellee. Mandate. Filed March 29, 1920."

ADJUDICATION OF BANKRUPTCY

Adjudication of Bankruptcy in the District Court of the United States for the Eastern District of Pennsylvania, Offered in Evidence on Behalf of the Plaintiff at Page 50

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISRICT OF PENNSYLVANIA

In Bankruptcy. No. 4742

In the Matter of LOUIS J. BERGDOLL MOTOR COMPANY, Bankrupt

"Adjudication of Bankruptcy

At Philadelphia, in said district, on the eleventh day of April, A. D. 1913, before the Honorable the Judges of said Court in Bankruptcy, the petition of W. C. Rhodes, Inc., Clinton Company, and The Castle Lamp Company, that Louis J. Bergdoll Motor Company, of Philadelphia, Pa. be adjudged bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, having [fol. 104] been heard and duly considered, the said Louis J. Bergdoll Motor Company is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable the Judges of said Court, and the seal thereof, at Philadelphia, in said District, on the eleventh day of April, A. D. 1913.

T. L. Cobaugh, Deputy Clerk District Court. (Seal.)

Endorsed: Cause No. 4742. District Court of the United States, Eastern District of Pennsylvania. In Bankruptcy. In the matter of Louis J. Bergdoll Motor Company, Bankrupt. Adjudication of bankruptcy. Entered this eleventh day of April, A. D. 1913. T. L. Cobaugh, Deputy Clerk District Court."

[fol. 105]

Summary of Debts and Assets

(From the Statement of the Bankrupt in Schedules A and B)

Offered in Evidence, Page 50

Schedule A-1 (1) Taxes and Debts due United States	None.	
Schedule A-1 (2) Taxes due States, Counties, District and Municipalities	None.	
Schedule A-1 (3) Wages	None.	
Schedule A-1 (4) Other debts preferred by law	.....	11,738.10
Schedule A-2 Secured Claims	None.	
Schedule A-3 Unsecured claims	.....	164,693.52
Schedule A-4 Notes and Bills which ought to be paid by other parties thereto	None.	
Schedule A-5 Accommodation Paper	None.	
Schedule A total	....	176,431.61
Schedule B-1 Real Estate	None.	
Schedule B-2-a Cash on hand	.....	445.68
Schedule B-2-b Bills, Promissory Notes, and Securities	.....	1,635.00

[fol. 106]

Schedule B-2-c Stock in Trade	.....	151,122.38
Schedule B-2-d Household Goods, etc.	None.	
Schedule B-2-e Books, Prints and Pictures	None.	
Schedule B-2-f Horses, Cows and other Animals	None.	
Schedule B-2-g Carriages and other Vehicles	.....	3,700.00
Schedule B-2-h Farming Stock and Implements	None.	
Schedule B-2-i Shipping and Shares in Vessels	None.	
Schedule B-2-k Machinery, Tools, etc.	.....	13,198.18

SUMMARY OF DEBTS AND ASSETS—Continued

Schedule B-2-l Patents, Copyrights, and Trade-marks	None.	
Schedule B-2-m Other personal Property	.....	.....
Schedule B-3-a Debts due on Open Accounts	.....	11,956.15
Schedule B-3-b Stocks, Negotiable Bonds, etc.	None.	
Schedule B-3-c Policies of Insurance	None.	
Schedule B-3-d Unliquidated Claims	None.	
Schedule B-3-e Deposits of Money in banks and elsewhere	.....	6,617.09
Schedule B-4 Property in Reversion, Remainder, Trust, etc.	None.	
Schedule B-5 Property claimed to be exempted	None.	
Schedule B-6 Books, Deeds and Papers	No value.	
Schedule B total		$188,674.48

[fol. 107] Joseph M. Hubert, Pres. of Louis J. Bergdoll Motor Company.

Endorsed: Cause No. 4742. U. S. District Court, Eastern District of Penna. In the Matter of Louis J. Bergdoll Motor Co., Bankrupt. Bankrupt's schedules. Arno P. Mowitz, Attorneys for Bankrupt. P. O. Address, 612 Franklin Bank Bldg., Phila., Pa. Filed —— —, 191-. ——— ——, Clerk. Received from referee and filed May 17, 1913."

[fol. 108] Oath and Report of Appraisers, Offered in Evidence on Behalf of the Plaintiff at Page 51

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In Bankruptcy. Cause No. 4742

In the Matter of THE LOUIS J. BERGDOLL MOTOR CO., Bankrupt

"OATH AND REPORT OF APPRAISERS

EASTERN DISTRICT OF PENNSYLVANIA, ss:

William F. Lorey, A. Merrill Ely, and James J. O'Brien, all of Philadelphia, in said District, being first duly sworn according to law depose and say that they will fully and fairly appraise the real and personal property of the above-named bankrupt according to their best skill and judgment.

William F. Lorey, A. Merrill Ely, James J. O'Brien.

Subscribed and sworn to before be this 15th day of May, 1913. Paul O. Kirschmann, Notary Public. Commission expires Jan. 15, 1917. Franklin Bank Bldg. (Notarial Seal.)

[fol. 109] Report of Appraisers.

We, the undersigned, having been notified that we were appointed appraisers to estimate and appraise the real and personal property of the above-named bankrupt, have attended to the duties assigned us, and, after a strict examination and careful inquiry, we do estimate and appraise the same as follows:

Personal property, premises S. W. cor. 16th & Callowhill Sts., Phila.

(Then follows a list of articles numbered from 1 to 1519, appraised at $36,621.49.)

Lot A

The Name, the Good-will, the right to use the Bergdoll name in the manufacture of Automobiles, Motor Trucks and Chassis; the Patterns, the Drawings, the Jigs, and the right to continue the repair business.

The right to receive all mail after the discharge of Frank A. Harrigan, Esq., as Receiver, and the right to receive mail between the date of the sale and the discharge of Mr. Harrigan as Receiver, subject, however, to the Receiver's examination of such mail. The Receiver agrees, however, to turn over to the purchaser of Lot A all mail pertaining to the ordering of new cars, the replacement of parts, of the manufacture of repair parts for Bergdoll Motor Cars."

[fol. 110] Petition and Order, Offered in Evidence on Behalf of the Plaintiff at Page 53

"In the District Court of the United States for the Eastern District of Pennsylvania

In Bankruptcy. No. 4742

In the Matter of Louis J. Bergdoll Motor Company, Alleged Bankrupt

Petition and Order Confirming Sale

To the Honorable the Judges of the said Court:

The petition of Frank A. Harrigan respectfully represents:

That on the 20th day of March, 1913, your petitioner was appointed Receiver of the estate of the above named alleged bankrupt and duly filed his bond.

That in pursuance to an order made by your Honorable Court on the 16th day of April, 1913, your petitioner exposed at public auction through Samuel T. Freeman & Company, Auctioneers, the property of the said alleged bankrupt, more particularly described in the hereto annexed catalogue, on the fourteenth and fifteenth days of May, 1913, after first duly advertising the sale by publication in daily papers and by catalogues, and upon ten days' notice to all known creditors.

[fol. 111] Your petitioner further avers that the said auctioneers offered the said property for sale in separate lots according to the catalogue hereto attached; that the aggregate of the highest bids for the said separate lots amounted to the sum of $45,062.85.

Your petitioner further avers that the aforesaid property was appraised by the appraisers appointed by your Honorable Court at the sum of $36,621.49.

Your petitioner believes and therefore avers that the said sum of $45,062.85 is a fair price for the said property and is as much as could be realized at a public sale of the same.

Your petitioner therefore prays your Honorable Court for an order confirming the said sale in separate lots for the sum of $45,062.85 and authorizing your petitioner to deliver to the purchasers the said property upon payment of the said sum of $45,062.85.

And your petitioner will ever pray etc.

Frank A. Harrigan.

United States of America,
Eastern District of Penna., ss:

Frank A. Harrigan being duly sworn according to law deposes and says that the foregoing facts are true and correct.

Sworn to and subscribed before me — Frank A. Harrigan, this 16th day of May, 1913.

T. L. Cobaugh, Deputy Clerk, District Court United States, Eastern District of Pennsylvania. (Seal.)

[fol. 112] Order

And now, to wit, May 19, 1913, upon consideration of the foregoing petition and on motion of Joseph W. Catharine, Esq., Attorney for the petitioner, it is ordered and decreed, that the sale in separate lots of the property described in the within petition, for the sum of $45,062.85 be and the same is hereby approved and confirmed, and the Receiver is hereby authorized to deliver the said property to the purchasers, thereof, upon payment of the said sum of $45,062.85.

By the Court:

Thompson, Judge.

Attest: T. L. Cobaugh, Deputy Clerk."

[fol. 113] Docket Entries, Offered in Evidence on Behalf of the Plaintiff at Page 54

"In the District Court of the United States for the Eastern Distr.ct of Pennsylvania

In Bankruptcy, Involuntary. Cause No. 4742

In the Matter of Louis J. Bergdoll Motor Company, Philadelphia

Referee: Joseph Mellors.
Attorneys: Frank A. Harrigan, for Petitioners; Joseph W. Catharine, for Receiver; Arno P. Mowitz, for Bankrupt.
Trustee: Frank A. Harrigan.

Docket Entries

Mar. 17, 1913.—Petition of W. C. Rhodes, Inc., et al., Creditors, that Louis J. Bergdoll Motor Company be adjudged Bankrupt is presented and filed in duplicate and filing fees $30.00 deposited whereupon.

Mar. 17, 1913.—Order to show cause is entered and Subpœna [fol. 114] exit—returnable April 1, 1913.

Mar. 17, 1913.—Subpœna with duplicate of the petition handed to Counsel for petitioners.

Mar. 20, 1913.—On Petition of W. C. Rhodes, Inc., a Creditor, and proof of notice presented and filed, Order appointing Frank A. Harrigan, Receiver—Security to be entered by the petitioner in $200. and by the Receiver in $10,000.

Mar. 20, 1913.—Order to enter the appearance of Frank A. Harrigan, Esq., et al., for Creditors, sur application for the appointment of a receiver, filed.

Mar. 20, 1913.—Bond of petitioning Creditor in $200., approved and filed.

Mar. 20, 1913.—Bond of Frank A. Harrigan as Receiver in $10,000. approved and filed.

Mar. 20, 1913.—Order to enter the appearance of Joseph W. Catherine, Esq., as Attorney for the Receiver, filed.

Mar. 22, 1913.—On petition of the Receiver presented and filed order restraining Philip Malickson, Judgment Creditor, from further proceeding against the property of the alleged bankrupt company, upon his judgment obtained and execution issued thereon—as in said petition more fully set forth.

Mar. 22, 1913.—On motion of Frank A. Harrigan, Esq., Receiver, Order appointing James J. O'Brien, W. F. Lorie and A. M. Ely, Appraisers.

Apr. 5, 1913.—Subpœna filed "Served March 18, 1913, etc."

Apr. 5, 1913.—Order to enter the appearance of Reilly, Hodge and Hare, Esquires, as Attorneys for Remy Electric Company, a Creditor, filed.

[fol. 115] Apr. 11, 1913.—On motion of Counsel for petitioning Creditors' Adjudication of Bankruptcy and Order of Reference to Richard S. Hunter, Referee, and copy of the order mailed to him.

Apr. 14, 1913.—On petition of the Receiver presented and filed it is ordered that Bergdoll Machine Company show cause why it should not deliver to the Receiver certain material as therein more fully set forth—Returnable Wednesday, April 16, 1913, at 10 A. M.

Apr. 16, 1913.—On application of counsel for the Receiver—Counsel for the Respondent present and assenting thereto—hearing on the foregoing rule to show cause etc., is continued until Friday, April 18, 1913, at 10 A. M.

Apr. 16, 1913.—Order to enter the appearance of Arno P. Mowitz Esq., as Attorney for the Bankrupt Company, filed.

Apr. 16, 1913.—Petition to Receiver for leave to sell the assets at public sale presented and filed.

Apr. 16, 1913.—Answer of North Broad Street Realty Co. to the foregoing petition of the Receiver presented and filed.

Apr. 16, 1913.—And now, after hearing on the petition of the Receiver for leave to sell and the answer thereto, Order authorizing the Receiver to expose the assets at public sale after inventory and appraisement and upon ten days notice (see order attached to petition of Receiver.)

Apr. 18, 1913.—On motion of Joseph W. Catharine, Esq., Attorney for the Receiver, John C. Gilpin, Esq., Attorney for Respondent present and assenting thereto, it is Ordered that the rule on [fol. 116] Bergdoll Machine Co., to show cause why it should not deliver to the Receiver certain material, be made absolute.

May 9, 1913.—On petition of the Louis J. Bergdoll Motor Co., (a New Jersey Corporation) presented and filed, it is Ordered that the petition be referred to Richard S. Hunter, Esq., Referee, to take testimony as to the title to the property in the hands of the Receiver.

May 15, 1913.—Inventory and Appraisement filed.

May 17, 1913.—Schedules of the Bankrupt Company received from the Referee and filed.

May 19, 1913.—On petition of the Receiver presented and filed Order confirming the sale of the assets for the sum of $45,062.85.

May 26, 1913.—Bond of Frank A. Harrigan as Trustee, in $10,000. Approved and filed.

May 31, 1913.—Bond of Frank A. Harrigan as Receiver, in $50,000. (Additional) Approved and filed.

Aug. 26, 1913.—Report of Referee under Order of Reference of May 9, 1913, filed.

Aug. 26, 1913.—Order to place the foregoing report of the Referee on the Bankruptcy argument list, filed.

Sept. 22, 1913.—The cause is heard on report of Referee and Decision reserved.

Sept. 23, 1913.—Agreement of Counsel filed.

Sept. 23, 1913.—Opinion of Court (McPherson, J.) filed.

Oct. 29, 1913.—Petition of North Broad Street Realty Co., for leave to file petition for review nunc pro tunc presented and filed.

Oct. 29, 1913.—Answer of Frank A. Harrigan, Receiver, to the foregoing petition, filed.

[fol. 117] Oct. 29, 1913.—And now, after hearing on the petition of the North Broad Street Realty Co., and the Answer of the Receiver thereto—Decision reserved.

Oct. 29, 1913.—Opinion of the Court filed—refusing petition for leave to file petition for review nunc pro tunc.

July 30, 1914.—Certificate by the Referee for review by the Judge of the question presented by the Order of the Referee disallowing the claim of E. L. Pflug received from the Referee and filed.

Jan. 4, 1915.—Certificate by the Referee for review by the Judge of the question presented by the Order of the Referee reducing the claim of the North Broad Street Realty Co., received from the Referee and filed.

June 3, 1915.—Order to place the foregoing Certificate for Review on the bankruptcy argument list, filed.

June 23, 1915.—Bond of Frank A. Harrigan as Trustee, in $50,000 (Additional) Approved and filed.

July 12, 1915.—The cause is heard (Thompson, J.) sur certificate for review—re claim of North Broad Street Realty Co., and decision reserved.

July 23, 1915.—Opinion of the Court filed—affirming the Order of the Referee, etc.

Oct. 25, 1915.—Certificate by the Referee for review by the Judge of the question presented by the Order of the Referee sur claim of United States Lighting and Heating Co., received from the Referee and filed.

Oct. 29, 1915.—Certificate by the Referee for review by the Judge [fol. 118] of the question presented by the Order of the Referee disallowing the claim of Erwin R. Bergdoll as an ordinary creditor in the sum of $31,270.00, received from the Referee and filed.

Nov. 1, 1915.—Order to place the foregoing Certificate for review on the bankruptcy argument list filed.

Nov. 1, 1915.—Order to place on the bankruptcy argument list—Certificate for review sur claim of United States Lighting and Heating Co., filed.

Nov. 29, 1915.—The cause is heard (Dickinson, J., sur Referee's

certificate for review re claim of United States Lighting and Heating Co., and decision reserved.

Dec. 8, 1915.—Certificate by the Referee for review by the Judge of the question presented by the Order of the Referee reducing the claim of Globe Machine and Stamping Co., a creditor, received from the Referee and filed.

Dec. 27, 1915.—Order transferring this cause from Richard S. Hunter, Esq., deceased, to whom it was heretofore referred, to Joseph Mellors, Esq., Referee, for the remaining proceedings therein. (See Order entered in Bankruptcy Minutes.)

Dec. 31, 1915.—Order to place the foregoing Certificate for review on the bankruptcy argument list, filed.

Jan. 22, 1916.—Opinion of the Court (sur claim of United States Lighting and Heating Co.) filed—approving the findings of the Referee and allowing the Order made—except the amount thereof is reduced to $13,672.33 and the petitions for review are each and both dismissed.

[fol. 119] Feb. 8, 1916.—The cause is heard (Dickinson J.) sur Certificate for review—re claim of Erwin R. Bergdoll and decision reserved.

Feb. 17, 1916.—Opinion of the Court filed, vacating the Orders of the Referee sur claim of Erwin R. Bergdoll and directing the Referee to proceed in accordance therewith.

Mar. 1, 1916.—Certificate of Referee reciting the allowance of the claim of Erwin R. Bergdoll in the sum of $31,270, in accordance with the opinion of the Court entered February 17, 1916, received from the Referee and filed.

Mar. 3, 1916.—Decree in accordance with the foregoing Order of the Referee presented, allowed (Dickinson J.) and filed.

Mar. 6, 1916.—Petition of Frank A. Harrigan Trustee, for an allowance of an Appeal and Order granting prayer thereof, filed.

Mar. 6, 1916.—Assignment of Error filed.

Mar. 6, 1916.—Citation allowed and exit.

Mar. 15, 1916.—Citation returned 'service accepted.'

Mar. 15, 1916.—Stipulation as to what shall constitute the record and appeal, filed.

May 31, 1916.—The cause is heard (Thompson J.) sur Certificate for review re claim of Globe Machine and Stamping Co., and Decision reserved.

June 21, 1916.—And now, to wit, it is Ordered that the petition for review filed by the Globe Machine and Stamping Co., be, and the same is hereby dismissed and the Order of the Referee affirmed. (See Order filed.)

July 17, 1916.—Mandate of the United States Circuit Court of Appeals affirming the Decree of this Court (Sur claim of Erwin R. Bergdoll) with costs, filed.

[fol. 120] June 26, 1918.—Certificate by the Referee for review by the Court of the question presented by the Order of the Referee assessing Louis J. Bergdoll for 55% of the par value of 3,000 shares of capital stock of the Bankrupt Company with interest hereon from

April 1st, 1912, and that he pay to the Trustee the amount thereof, to wit, the sum of 213,874.31 received from the Referee and filed. (Testimony in separate package.)

Oct. 30, 1918.—Order to enter the appearance of Harry E. Keller, Esq., specially, for Louis J. Bergdoll, filed.

Oct. 30, 1918.—Motion of Louis J. Bergdoll in writing for dismissal of Certificate for review of Order of May 20, 1918, filed.

Oct. 30, 1918.—The cause is heard (Dickinson, J.) sur certificate for review and motion of Louis J. Bergdoll to dismiss same and decision reserved.

Nov. 13, 1918.—Opinion of Court filed—reserving pro forma the orders made by the Referee and remitting the cause to the Referee for further proceedings.

Feb. 24, 1919.—On petition of Louis J. Bergdoll presented and filed, Order extending the time within which the petitioner may file his petition for review until March 6, 1919, incl.

Mar. 15, 1919.—Certificate by the Referee for review by the Court of the question presented by the Order of the Referee assessing Louis J. Bergdoll for .5185% of the par value of 3,000 shares of capital stock of the Bankrupt Co., etc., received from the Referee and filed.

May 14, 1919.—The cause is heard (Dickinson J.) sur the fore-[fol. 121] going certificate for review and decision reserved.

June 2, 1919.—Opinion of the Court (sur certificate for review filed March 15, 1919) filed.

July 1, 1919.—Opinion of the Court (Additional) filed—denying petition for review, approv- findings of the Referee and affirming and confirming the Order made.

July 1, 1919.—Decree in accordance with the foregoing opinion of the Court, filed.

July 10, 1919.—Petition of Louis J. Bergdoll for allowance of an appeal presented and filed and Order granting prayer thereof. Bond to be entered in $250.

July 10, 1919.—Assignments of Error filed.

July 10, 1919.—Bond of Louis J. Bergdoll on Appeal in $250, without surety, approved and filed. ($250. this day deposited in Registry Court.)

July 10, 1919.—Citation allowed and exit.

July 10, 1919.—Citation returned 'service accepted' and filed.

Aug. 7, 1919.—Stipulation as to transcript of record sur appeal, filed.

Mar. 29, 1920.—Mandate of the United States Circuit Court of Appeals reversing the decree of this Court with certain modifications filed (See Mandate filed.)

May 25, 1921.—Order of Court directing fund on deposit in the Registry of the Court be distributed, filed.

[fol. 122] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, George Brodbeck, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the

annexed and foregoing is a true and faithful copy of the Docket Entries in the matter of the Louis J. Bergdoll Motor Company, In Bankruptcy, Cause No. 4742, now remaining among the records of said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this thirteenth day of February in the year of our Lord one thousand, nine hundred and twenty-three and in the one hundred and forth-seventh year of the Independence of the United States.

George Brodbeck, Clerk, by Gilbert W. Landing, Deputy Clerk." (Seal.)

Certified Docket Entries, Offered in Evidence on Behalf of the Plaintiff at Page 54

[fol. 123] "In the District Court of the United States for the Eastern District of Pennsylvania

No. 2824, September Sessions, 1913

Frank A. Harrigan, Trustee in Bankruptcy of the Estate of the Louis J. Bergdoll Motor Company, Bankrupt,

v.

Erwin R. Bergdoll

Joseph W. Catharine, Graham & Gilfillan.

Docket Entries

Oct. 15, 1913.—Præcipe for Summons filed. Summons exit—returnable the first Monday of November next.

Oct. 16, 1913.—Summons returned "Service Accepted" and filed. Order for the appearance of Graham & Gilfillan, Esquires, for defendant, filed.

Oct. 17, 1913.—Statement of Claim filed. Rule to file an affidavit of defense, filed.

Nov. 8, 1913.—Affidavit of Defense filed.

Nov. 12, 1913.—Rule to plead filed.

Nov. 13, 1913.—Plea and notice of special matter filed.

[fol. 124] Nov. 14, 1913.—Order to place case on trial list, filed.

Apr. 23, 1914.—Jury called.

Apr. 25, 1914.—Verdict for plaintiff Thirty-three thousand three hundred seventy and 35-100 (33,370.35) Dollars.

Apr. 29, 1914.—Defendant's motion and reasons for new trial filed. Plaintiff's Bill of Costs, filed.

May 11, 1914.—Argued sur motion for new trial.

May 15, 1914.—Order refusing motion for new trial, filed.

May 19, 1914.—Bill of Exceptions filed.

May 22, 1914.—Præcipe for judgment filed. Judgment accordingly. Judgement filed.

May 29, 1914.—Assignments of Error filed. Petition for writ of error filed. Order allowing writ of error filed. Bond sur writ of error and order of approval, filed. Writ of Error allowed and copy thereof lodged in Clerk's office for adverse party. Citation allowed and issued. Citation returned "service accepted" and filed. Præcipe for transcript of record sur writ of error, filed.

May 27, 1915.—Præcipe to mark judgment "satisfied," filed. By order of præcipe filed the judgment in this case is marked "Satisfied." Clerk's costs paid.

Attest:

Leo A. Lilly, Deputy Clerk."

[fol. 125] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, George Brodbeck, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of the Docket Entries in the case of Frank A. Harrigan, Trustee in Bankruptcy of the Estate of Louis J. Bergdoll Motor Company, Bankrupt, v. Erwin R. Bergdoll, No. 2824 September Sessions, 1913, now remaining among the records of said court in my office.

In testimony whereof I have hereto subscribed my name and affixed the seal of the said District Court at Philadelphia, this thirteenth day of February in the year of our Lord one thousand, nine hundred and twenty-three and in the one hundred and forty-seventh years of the Independence of the United States.

George Brodbeck, Clerk, by Gilbert W. Landing, Deputy Clerk." (Seal.)

DOCKET ENTRIES, OFFERED IN EVIDENCE ON BEHALF OF THE PLAINTIFF AT PAGE 56

"Cause No. 4742

LOUIS J. BERGDOLL

1913.

Apl. 12. Received from Clerk of Court Order of Reference.

[fol. 126] Apl. 19. Petition for rule to show cause why bankrupt should not file his own schedules filed.

Apl. 29. Answer of Receiver to Petition for rule to show cause why bankrupt should not file its own schedules filed.

Apl. 29. Petition for Order to sell property of bankrupt in Chicago, filed.

May 2. Mailed notice to creditors of first meeting to be held on Friday, May 16th, 1913, at 10:30 A. M.

May 5. Referee confirms sale of bankrupt's assets in Chicago for $5,850.

May 12. Certified copy of Petition of Louis J. Bergdoll Motor Co. as to title, etc., and order of court thereon received from Clerk of Court, referring the matter to Richard S. Hunter, as Special Referee, to take testimony as to title of property.

May 13. Petition for leave to defer filing of schedules filed.

May 16. Bankrupt's schedule in triplicate filed. Copy mailed to Clerk of Court.

May 16. First meeting of creditors held. Creditors elect Frank A. Harrigan, present Receiver, as Trustee. No bond fixed for the present.

May 21. Petition of Globe Machine & Stamping Co. for reclamation filed.

May 24. Bond of Frank A. Harrigan, Trustee, with Fidelity & Deposit Co., of Maryland, as surety, in sum of $10,000 received approved and mailed to Clerk of Court.

May 26. Petition of Christian C. Garlick for Reclamation of automobile filed.

May 27. Bond of Frank A. Harrigan, Trustee, with the American
[fol. 127] Surety Co. as surety, in sum of $50,000 received, approved by Referee and mailed to Clerk of Court.

June 6. Answer of Frank A. Harrigan, Receiver of bankrupt, to petition of Globe Machine & Stamping Co. filed.

June 24. Referee enters order authorizing Trustee to deliver to Globe Machine & Stamping Co. 753 running boards in his possession.

July 23. Referee's report sur petition of Louis J. Bergdoll Motor Co. of New Jersey filed (Petition and Order of Court, testimony and 5 Exhibits attached.)

Aug. 4. Petition of Louis J. Bergdoll Motor Co of New Jersey for Review of Referee's Finding and Recommendations filed.

Aug. 4. Exceptions of Louis J. Bergdoll Motor Co. of New Jersey to Findings and Recommendations of Referee upon Petition of Louis J. Bergdoll Motor Co. of New Jersey for reclamation of Assets filed.

Aug. 26. Report of Referee sur petition of Louis J. Bergdoll Motor Co. of New Jersey, Exceptions and Referee's Report on Exceptions filed with Clerk of Court.

Sept. 22. Agreement entered into between Counsel for Receiver and Counsel for Louis J. Bergdoll that all claims against both the New Jersey corporation and Pennsylvania corporation may be proved before the Referee, and the funds in hand shall be divided pro rata, and for that purpose only the two companies shall be considered as one.

Sept. 26. Mailed notice to creditors of a meeting to be held on Thursday, Oct. 9th, 1913, at 10 A. M. to audit Receiver's Account, allow costs and fees, and declare a divi-
[fol. 128] dend.

Sept. 26. Proof of Mailing and Advertising notice of First meeting of Creditors filed.

Oct. 8. Exceptions of North Broad St. Realty Co. filed.
Oct. 9. Receiver's Account filed.
Oct. 9. Meeting held, Receiver's Account audited. Fees and costs allowed. Referee declares a first dividend of 5%.
Oct. 11. Schedule of distribution and dividend sheet filed.
Oct. 17. Bond of Trustee approved by Referee and mailed to Clerk of Court.
Oct. 18. Exceptions of North Broad St. Realty Co. to certain items in Account of Receiver filed.
Oct. 18. Exceptions of North Broad St. Realty Co. to Receiver's Account filed.
Oct. 29. Answer to Frank A. Harrigan, to Petition of N. Broad St. Realty Co. for leave, etc., filed.
Nov. 5. Petition for Order on Trustee to pay 5% dividend on full amount of claim of A. O. Smith & Co. filed.
Nov. 13. Objection of Trustee to claim of North Broad St. Realty Co. filed.
Nov. 13. Objection of Trustee to claim of Philadelphia Consistory filed.
Nov. 13. Objections of Trustee to claim of Blue Ribbon Auto & Car Co. filed.
Nov. 13. Objections of Trustee to claim of E. L. Webster filed.
Nov. 13. Objections of Trustee to claim of Peckman & Co. to use of Mary E. Elyee filed.
Nov. 13. Objections of Trustee to claim of Hudson-Thurber Co. filed.
Nov. 13. Objections of Trustee to claim of J. W. Ball filed.
[fol. 129] Nov. 13. Objections of Trustee to claim of Crane & Wagner filed.
Nov. 13. Objections of Trustee to claim of Chicago Daily Journal filed.
Nov. 13. Objections of Trustee to claim of Clarke & Kendrick filed.
Nov. 13. Objections of Trustee to claim of Hamblet Ave. Garage filed.
Nov. 13. Objections of Trustee to claim of Hoffecker Co. filed.
Nov. 13. Objections of Trustee to claim of Keystone Co. filed.
Nov. 13. Objections of Trustee to claim of Remy Electric Co. filed.
Nov. 13. Objections of Trustee to claim of Frederick Reynolds filed.
Nov. 13. Objections of Trustee to claim of Stewart Warner Speedometer Co. filed.
Nov. 13. Objections of Trustee to claim of United Rim Co. filed.
Nov. 13. Objections of Trustee to claim of Washington Motor Car Equipment Co. filed.
Nov. 13. Objections of Trustee to claim of Blomberg Auto Co. filed.
Nov. 13. Objections of Trustee to claim of Felker Co. filed.
Nov. 13. Objections of Trustee to claim of B. F. Goodrich Co. filed.
Nov. 13. Objections of Trustee to claim of Globe Machine & Stamping Co. filed.

Nov. 13. Objections of Trustee to claim of Marburg Bros. filed.
Nov. 13. Objections of Trustee to claim of Josiah A. Goddard filed.
Nov. 13. Objections of Trustee to claim of U. S. Fidelity & Guaranty Co. filed.
[fol. 130] Nov. 13. Objections of Trustee to claim of Sears-Cross Co. filed.
Nov. 13. Objections of Trustee to claim of Muskegon Valley Furniture Co. filed.
Dec. 11. Meeting held—Declaration of Dividend postponed, as fund on hand would not justify it at present time.
Dec. 18. Finding of Referee sur claim of George F. Knight, agent, filed.
Dec. 29. Answer of Blomberg Auto Co. to Objections of Trustee filed.

1914.

Jan. 6. Finding of Referee sur claim of N. Broad St. Realty Co. for coal consumed on premises of bankrupt filed.
Jan. 26. Objection of Trustee to claim of Igou Motor Co. filed.
Jan. 26. Objections of Trustee to claim of Hayes Mfg. Co. filed.
Jan. 26. Objections of Trustee to claim of Penn Radiator Co. filed.
Jan. 26. Objections of Trustee to claim of George W. Nock filed.
Jan. 26. Objections of Trustee to claim of Peninsular Milled Screw Co. filed.
Jan. 26. Objections of Trustee to claim of Shopper Pub. Co. filed.
Jan. 26. Objections of Trustee to claim of Chilton Co. filed.
Jan. 26. Objections of Trustee to claim of R. E. Rodriquez filed.
Jan. 26. Objections of Trustee to claim of Kaiser Motor Co. filed.
Jan. 26. Objections of Trustee to claim of E. L. Pflug filed.
Mch. 21. Referee's Finding sur claim of B. F. Goodrich Co. filed.
[fol. 131] Mch. 23. Referee's award sur claim of Muskegon Valley Furn. Co. filed.
June 6. Mailed notice to creditors of a meeting to be held on Wednesday, June 17, 1914, at 12 M. to audit Trustee's Account, allow costs and fees.
June 17. Meeting held. Trustee's Account filed, admitted, and fees and costs allowed.
July 22. Exceptions filed to decision of Referee sur claim of E. L. Pflug.
July 29. Petition for Review of E. L. Pflug filed.
July 30. Certificate of Referee sur Petition for review filed with Clerk of Court (Proof of claim of E. L. Pflug; Objections of Trustee; Findings of Referee, minutes of Meetings, and Petition for Review annexed.)
Dec. 23. Finding of Referee sur claim of N. Broad St. Realty Co. for rent from Aug. 1st, 1911, to Mch. 31st, 1912, filed.
Dec. 23. Finding of Referee sur claim of N. Broad St. Realty Co. for $11,687.32 as a preference filed.
Dec. 23. Finding of Referee sur claim of Louis J. Bergdoll for $40,621.54 filed.

1915.

Jan. 4. Petition for Review of Referee's Finding sur claim of N. Broad St. Realty Co. filed.

Jan. 4. Certificate of Referee sur Petition for Review, filed with Clerk of Court. (Petition for Review; Referee's Finding; Proof of Claim; Objections of Trustee, and minutes of meetings annexed.)

Jan. 7. Finding of Referee sur claim of Louis J. Bergdoll, $395,000 filed.

Mar. 5. Mailed notice to creditors of a meeting to be held on
[fol. 132] Tuesday, March 16th, 1915, at 11:30 A. M. to audit Trustee's Account, allow costs and fees, and declare second dividend.

Mch. 15. Trustee's Account filed.

Mch. 16. Meeting held. Trustee's Account audited, fees and costs allowed. Referee declares a second dividend of 5%.

Mch. 17. Schedule of distribution and dividend sheet filed.

Mch. 24 Finding of Referee sur claim of Blue Ribbon Auto & Carriage Co. filed.

May 28. Mailed notice to creditors of a meeting to be held on Monday, June 7th, 1915, at 10 A. M. to audit Trustee's Account, allow costs and fees, and declare third dividend.

June 7. Trustee's Third Account filed.

June 7. Meeting held. Costs and fees allowed. Referee declares a third dividend of 5%.

Oct. 6. Finding of Referee sur claim of U. S. Light & Heating Co. filed.

Oct. 16. Petition of U. S. Light & Heating Co. for Review filed.

Oct. 16. Trustee's Petition for Review of claim of U. S. Light & Heating Co. filed.

Oct. 18. Referee's Finding sur claim of Erwin R. Bergdoll filed.

Oct. 28. Petition for Review of Erwin R. Bergdoll filed.

Oct. 29. Certificate of Referee sur petition for review of claim of Erwin R. Bergdoll filed with Clerk of Court. (Proof of Debt; Objections of Trustee; Finding of Referee and Petition for Review annexed.)

Nov. 23. Finding of Referee sur claim of Globe Machine & Stamping Co. filed.

Dec. 2. Petition for Review of Referee's Finding sur claim of
[fol. 133] Globe Machine & Stamping Co. filed.

Dec. 7. Certificate of Referee sur Petition for Review of Referee's Finding sur claim of Globe Machine & Stamping Co. filed with Clerk of Court. (Proof of Claim; Objections of Trustee; Finding of Referee; Petition for Review and Minutes of meetings annexed.)

Dec. 14. Referee enters Order as of May 24, 1915, releasing bond of Receiver with American Surety Co. in sum of $50,000.

Dec. 14. Referee enters Order as of April 6th, 1915, ordering bond of Trustee, with American Surety Co. in sum of $10,000 released.

Dec. 27. Received notice from Clerk of Court of Order entered referring cause to Joseph Mellors, Esq., Referee, owing to death of Richard S. Hunter, Referee.

[fol. 134] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Bankruptcy. Cause No. 4742

In the Matter of LOUIS J. BERGDOLL MOTOR CO., Bankrupt

COPY OF PROCEEDINGS BEFORE JOSEPH MELLORS, REFEREE, TO WHOM THE ABOVE MATTER WAS REFERRED UPON THE DEATH OF REFEREE HUNTER.

1916.

Jan. 24. Received from Clerk certified copy of Judge's opinion affirming Referee re claim of the U. S. Light & Heat Co.

Feb. 2. Hearing on claim of U. S. Light & Heat Co. Claim allowed and dividend paid.

18. Received certified copy of Judge's opinion overruling order of Referee re claim of Erwin R. Bergdoll.

29. Made order allowing claim of Erwin R. Bergdoll in the sum of $3,200 per order of Court.

Apr. 15. Assignment by Warner Gear Co. to Louis J. Bergdoll
[fol. 135] filed for $4,735 of its claim.

19. Countersigned check to L. J. Bergdoll $710.25 first dividend on part claim Warner Gear Co., assigned.

June. 22. Received certified copy of order of Court dismissing appeal of Globe Machine & Stamping Co.

July 1. Received from Mrs. R. S. Hunter $52.70 excess indemnity of the late Referee.

July 7. Received from Trustee indemnity of $250.

Nov. 8. Hearing re claim of Warner Gear Co.

29. Claim of Finnessey & Kobler reduced by claimant and allowed in the sum of $74.81.

23. Filed petition of Warner Gear Co. to amend claim by increasing same to $24,773.13.

Dec. 8. Hearing. Claim of Perkins Machine Co. heard and allowed in the sum of $29.40. Claim of Mary E. Klyee allowed by agreement in the sum of $250.

19. Hearing re claim of Igou Motor Co. Discussion. Adjournment to January 4, 1917.

1917.

Mar. 19. Stipulation of parties filed and approved reducing and allowing claim of Igou Motor Co. in the sum of $422.90.

Apr. 13, Mailed 227 notices of meeting, April 23, 1917, at 10:00 A. M. to consider compromise of Warner Gear claim.

23. Meeting of creditors. Petition of Trustee to compromise claim of Warner Gear Co., and after hearing order entered allowing said claim in the sum of $10,000.

June 12. Filed opinion and order disallowing claim of Hudson
[fol. 136] Thurber Co., and sent copy thereof to counsel.

Oct. 10. Mailed 279 notices of meeting, October 22, 1917, to consider Trustee's fourth account and to consider assessment of stockholders.

Oct. 22. Meeting of creditors. Petition of Trustee for assessment of stockholders filed and considered and order made. Trustee's fourth Account filed, balance $18,689.62. On motion a dividend of 4% to creditors was ordered. Counsel for the Trustee asked for a fee of $6,000. and filed statement of his service.

Order entered allowing additional fee of $6,000 to attorney for Trustee.

Oct. 24. On motion of Trustee order of October 22., 1917, assessing stockholders vacated and rule on stockholders on said petition for assessment. Exit—returnable Nov. 15, 1917.

30. Filed exception and petition for review of L. J. Bergdoll allowance of counsel fee.

31. Filed answer of L. J. Bergdoll to petition of Trustee for assessment of stock.

Nov. 12. Filed order of partial distribution declaring fourth dividend of 4%.

Received from Trustee $100 on account of Referee's costs, etc.

15. Filed answer to Louis J. Bergdoll to petition of Trustee for assessing stock, etc.

Filed proof of service on stockholders of rule, etc. for assessment.

Hearing on petition of Trustee for assessment of stockholders. Evidence submitted.

24. Received from L. C. Bergdoll $14.75—1 copy of testimony November 15, 1917.

Dec. 4. Filed withdrawal of petition of L. J. Bergdoll for review
[fol. 137] of order allowing counsel fees.

11. Hearing re counsel fee. Discussion. Adjourned to Dec. 19, 1917, at 11.00 A. M.

19. Hearing re assessment of stockholders. Evidence closed. Hearing argument.

31. Hearing re counsel fee. Discussion.

1918.

Jan. 7. Received from L. C. Bergdoll $4.25—1 copy of testimony of December 19 and 31.

11. Hearing re assessment of stockholders. Further evidence.

15. Hearing re assessment etc. No proceedings in absence of witness.

22. Hearing re assessment etc. No proceedings in absence of witness.

Feb. 5. Received from L. C. Bergdoll $1.25—1 copy of testimony, January 11, 1918.

8. Received from L. C. Bergdoll $5.20—copies of exhibit.

May 9. Prepared opinion of Referee re assessment of stockholders. (Copies sent parties.)

18. Entered Order extending time for filing Petition for Review to May 22, 1918.

May 29. Filed Petition for Review of Referee's Order entered May 20, 1918.

June 26. Filed with the Clerk Certificate for Review of Order re assessment of Stockholders. (Notified parties.)

July 8. Order entered dismissing Exceptions to allowance of $6,000 Counsel fee.

10. Countersigned check for balance of counsel fee $3,350.

Nov. 13. Received Copy of Judges opinion referring matter of as-
[fol. 138] sessment to Referee for further proceedings.

1919.

Feb. 14. Order entered re assessment of stockholders. (Copy sent parties.)

25. Received Copy of Petition for Order extending time for filing petition for Review and Order thereon. Time extended to March 6, 1919.

Mar. 6. Filed Petition for Review of Referee's Order entered Feb. 14, 1919.

15. Filed with Clerk Certificate for Review of Order of Feb. 14, 1919. (Notified parties.)

June 3. Received copy of Judge's Opinion re assessment of stockholders.

July 1. Received copy of Judge Dickinson's Opinion affirming the Order of the Referee re assessment of Louis J. Bergdoll.

Aug. 13. Filed Assignment of claim of W. C. Rhoades, Inc., to L. J. Bergdoll.

Filed assignment of claim of Arno P. Mowitz, to L. J. Bergdoll.

Filed assignment of claim of Frank J. Fanning to L. J. Bergdoll.

Filed assignment of claim of Fanning Motor Co. to L. J. Bergdoll.

Filed assignment of claim of Auto Accessories Co. to L. J. Bergdoll.

Filed assignment of claim of North Broad St. Real. Co. to L. J. Bergdoll.

Filed assignment of claim of Vulcan Oil Co. to L. J. Bergdoll.

Filed assignment of claim of Erwin R. Bergdoll to L. J. Bergdoll.

Filed assignment of claim of Erwin Motor & Mach. Co. to L. J. Bergdoll.

Filed assignment of claim of The Chilton Co. to L. J. Bergdoll.

[fol. 139] I, Joseph Mellors, Referee in Bankruptcy, to whom the above matter was referred, upon the death of Richard S. Hunter, Referee, do hereby certify that the foregoing is a true and correct copy of the proceedings had before me in this matter.

Dated at Philadelphia, this 13th day of February, A. D. 1923.

Joseph Mellors, Referee in Bankruptcy."

Petition, Offered in Evidence of Behalf of the Plaintiff at page 57

"In The United States District Court for the Eastern District of Pennsylvania

In Bankruptcy. No. 4742

In the matter of Louis J. Bergdoll Motor Company, Bankrupt, a Pennsylvania Corporation

Petition for an Order for an Assessment upon Capital Stock and for Leave to Institute Proceedings to Recover Unpaid Subscriptions Thereon.

To the United States District Court for the Eastern District of Pennsylvania, Hon. Joseph Mellors, Referee:

The Petition of Frank A. Harrigan respectfully represents:

[fol. 140] 1. That your Petitioner is the Trustee in Bankruptcy herein, duly qualified and acting.

2. That said bankrupt Company was organized under the laws of the State of Pennsylvania with a capital stock of $500,000 divided into 5,000 shares of the par value of $100.00 each.

3. That Louis J. Bergdoll, of the City of Philadelphia, subscribed for 2,998 shares, E. Lawrence Webster, 1 share, and Frank J. Fanning, 1 share, of said capital stock.

4. That capital stock of the bankrupt Company was issued April 1, 1912 to Louis J. Bergdoll, E. Lawrence Webster and Frank J. Fanning, as subscribed for to the amount of $300,000.00 as full-paid and non-assessable, for a consideration approximating $144,428.03, or about $155,571.97 less than its nominal value, and that no part of said latter sum has since been paid to the bankrupt Company or to your Petitioner as Trustee of said bankrupt.

5. That the whole amount paid as aforesaid for said stock, to wit, $144,428.03, was contributed by Louis J. Bergdoll, and consisted of

a small amount of cash and other personal property constituting the net assets of a New Jersey corporation then owned and controlled by the said Louis J. Bergdoll.

6. That the said E. Lawrence Webster and the said Frank J. Fanning paid no consideration for the said two shares of stock subscribed for and issued to them as aforesaid, and were merely the nominal holders thereof for the sole benefit of the said Louis J. Bergdoll in the organization and conduct of the business of said corporation.

[fol. 141] 7. That the balance due on said 3,000 shares of stock issued as aforesaid to the said Louis J. Bergdoll, E. Lawrence Webster and Frank J. Fanning is approximately $155,000.00, together with interest thereon from April 1, 1912.

8. That no assessment was ever made by the bankrupt Company in so far as your Petitioner is informed and believes, and therefore avers, for the amounts due and unpaid on said subscriptions.

9. That all of said 3,000 shares of stock were, in January, 1913, transferred by said parties as follows: To Erwin R. Bergdoll, 2,998 shares; Charles A. Bergdoll, 1 share; Grover C. A. Bergdoll, 1 share, under an agreement between Louis J. Bergdoll and Erwin R. Bergdoll, whereby the latter undertook and agreed to finance, operate and manage the affairs of said Company, and thereafter the said Erwin R. Bergdoll, Charles A. Bergdoll and Grover C. Bergdoll, in violation of the terms of said agreement, transferred and assigned, in March, 1913, said 3,000 shares of stock as follows: To Emma C. Bergdoll, 2,997 shares; to Joseph M. Hubert, 1 share; to E. J. Tague, 1 share; and to William Ruhland, 1 share, without any consideration therefor.

10. That at the times when all of said transfers of stock were made as set forth in the preceding paragraph, said corporation was insolvent and unable to pay its many pressing obligations, and was so known to be by all of the named parties to said transactions, with the possible exceptions of Joseph M. Hubert, E. J. Tague and William Ruhland, and all of said parties not so excepted, also, knew, [fol. 142] or had the means within their own control of knowing, that said stock when issued to or acquired by them respectfully was not full paid.

11. That the debts of said bankrupt, after deducting dividends heretofore made thereon, amount to $202,620.40, and that the balance of assets remaining in the hands of your Petitioner amounts to $18,689.62, leaving a deficiency of $183,930.78, plus additional costs of administration of estate.

12. That the creditors herein have requested your Petitioner, as Trustee, to institute proceedings against the said Louis J. Bergdoll, E. Lawrence Webster, Frank J. Fanning, Erwin R. Bergdoll, Charles A. Bergdoll, Grover C. Bergdoll, Emma C. Bergdoll, Joseph M. Hubert, E. J. Tague and William Ruhland, for the collection or re-

covery of such amounts as may be due respectively by them as subscribers for or holders of said 3,000 shares of the capital stock of said Company, and your Petitioner has been advised by his counsel, Joseph W. Catherine, Esq., that he has a good and valid cause of action against said parties.

13. That no previous application has been made for the Order herein prayed for.

Whereof your petitioner prays that an assessment of fifty-five (55) per centum be ordered to be made by your Petitioner, or be made by the Court, upon each and every share of the capital stock of said Corporation which has been issued at less than its par value, or upon which the full amount of its par value has not heretofore been paid, of one hundred (100) per centum of the par value thereof [fol. 143] less any amounts which may have heretofore been actually paid upon said shares in money or money's worth, and further authorizing and directing your Petitioner to institute such proceedings, suits or actions as may be deemed expedient and proper against the Said Louis J. Bergdoll, E. Lawrence Webster, Frank J. Fanning, Erwin R. Bergdoll, Charles A. Bergdoll, Grover C. Bergdoll, Emma C. Bergdoll, Joseph M. Hubert, E. J. Tague and William Ruhland, for the collection or recovery of such amounts as may be due respectively by them as subscribers for or holders of said 3,000 shares of the capital stock of said Company, and against such other parties as may appear to have an interest in the question involved in said proceedings.

Frank A. Harrigan, Petitioner.

STATE OF PENNSYLVANIA,
City and County of Philadelphia:

I, Frank A. Harrigan, the Petitioner mentioned and described in the foregoing Petition, do hereby make solemn oath that the statements therein contained are true according to the best of my knowledge, information and belief.

Frank A. Harrigan.

Sworn to and subscribed before me this 22 day of October, A. D. 1917. Joseph Mellors, Referee."

[fol. 144] Answer, Offered in Evidence on Behalf of the Defendant at Page 57

"In the United States District Court for the Eastern District of Pennsylvania

In Bankruptcy. No. 4742

In the Matter of Louis J. Bergdoll Motor Company, Bankrupt

Answer of Louis J. Bergdoll to Petition for an Order for an Assessment upon Capital Stock and for Leave to Institute Proceedings to Recover Unpaid Subscriptions Thereon.

To the United States District Court for the Eastern District of Pennsylvania, Hon. Joseph Mellors, Referee:

The Answer of Louis J. Bergdoll, to the petition of Frank A. Harrigan, Trustee in above case, for an order for an assessment upon capital stock, and for leave to institute proceedings to recover unpaid subscriptions thereon respectfully sets forth:

1. That this deponent is the Louis J. Bergdoll Referred to in said petition.

[fol. 145] 2. That the said Louis J. Bergdoll Motor Co. was incorporated with an authorized capital of $500,000. But no more than $300,000 was issued, and this was issued full paid and non-assessable for the assets, good will and business of the Louis J. Bergdoll Motor Co., a corporation of New Jersey, which as a matter of fact and as well from an equitable standpoint, constituted the domestication of the New Jersey Corporation in the State of Pennsylvania there having been shown or even suggested no other object or motive by the Receiver, Trustee, or any one in interest that the Pennsylvania Corporation was incorporated for any other purpose than to take over the New Jersey Corporation's business and prevent the attachment of its assets by foreign attachment proceedings, thereby amounting to *be* facto domestication of the Foreign Corporation, i. e. the Louis J. Bergdoll Motor Co. of New Jersey.

3. That no stock was subscribed for by anyone in the Pennsylvania Corporation, but the stock was issued for the purposes set forth in the preceding paragraph.

4. That in the course of this bankruptcy proceeding, Your Honorable Court has offered that the two corporations should be considered as one corporation for the purposes of this bankruptcy proceeding, and this deponent having advanced upwards of $462,000 in cash to the corporation, presented his claim to the Referee, the Honorable Richard Hunter, (Now deceased), and the trustee through counsel, contested such claim and it was so proceeded with that the learned Referee in an opinion filed January 7th, 1915, said:

"The Referee finds that the sum of $300,000 was contributed by [fol. 146] Louis J. Bergdoll to the capital stock of the New Jersey Company, and that the stock of the Pennsylvania Company, which took over its assets and liabilities, thereby became fully paid.

"The Referee disallows the claim of Louis J. Bergdoll against the bankrupt for the sum of $300,000.

"The Referee allows the claim of Louis J. Bergdoll as a creditor of the Bankrupt in the sum of $10,000.

(Sgd.) Richard S. Hunter, Referee."

January 7th, 1915.

5. That the decision was not appealed from by either the trustee or the claimant, and still remains unreserved.

6. That all of the averments of said petition, inconsistent with the foregoing, are specifically denied, and he denies that he was a stockholder of either of the corporations bankrupt at the time of the filing of the petition or the adjudication in bankruptcy or for some months prior to thereto.

7. That it is now nearly three years since the decision of Honorable Richard Hunter in regard to the full payment of the stock of the Pennsylvania Corporation, and it is over four years since the Trustee and his counsel were familiar with all the facts of this case and nothing has been done by them until now.

8. This deponent asks that the said petition be dismissed.

And he will ever pray, etc.

Louis J. Bergdoll.

[fol. 147] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Louis J. Bergdoll, being duly sworn according to law, deposes and says, that he is the deponent above named; that the facts set forth in the foregoing answer to petition are just and true to the best of his knowledge and belief.

Louis J. Bergdoll.

Sworn and Subscribed Before me this Fourteenth Day of November, A. D. 1917. Earl T. Kramer, Notary Public. My commission expires May 19th, 1919. (Notarial Seal.)"

[fol. 148] Answer, Offered in Evidence on Behalf of the Defendant at page 57

"In the United States District Court for the Eastern District of Pennsylvania

In Bankruptcy. No. 4742.

In the Matter of Louis J. Bergdoll Motor Company, Bankrupt

Answer of Louis J. Bergdoll to Petition for an Order for an Assessment upon Capital Stock and for Leave to Institute Proceedings to Recover Unpaid Subscriptions Thereon.

To the United States District Court for the Eastern District of Pennsylvania, Hon. Joseph Mellors, Referee:

The answer of Louis J. Bergdoll to the petition of Frank A. Harrigan, Trustee in above case, for an order for an assessment upon capital stock and for leave to institute proceedings to recover unpaid subscriptions thereon respectfully sets forth:

1. That this deponent is the Louis J. Bergdoll referred to in said petition.

[fol. 149] 2. That the said Louis J. Bergdoll Motor Co. was incorporated with an authorized capital of $500,000 but no more than $300,000 was issued, and this was issued full paid and non assessable for the assets, good will and business of the Louis J. Bergdoll Motor Co., a corporation of New Jersey.

3. That no stock was subscribed for by anyone in the Pennsylvania corporation, but the stock was issued for the purposes set forth in the preceding paragraph.

4. That in the course of this bankruptcy proceeding, Your Honorable Court has ordered that the two corporations should be considered as one corporation for the purposes of this bankruptcy proceeding, and this petitioner having advanced upwards of $462,000 in cash to the corporation, presented his claim to the Referee, The Honorable Richard Hunter, (Now deceased), and the Trustee through counsel, contested such claim and it was so proceeded with that the learned Referee in an opinion filed January 7th, 1915, said

'The Referee finds that the sum of $300,000 was contributed by Louis J. Bergdoll to the capital stock of the New Jersey Company, and that the stock of the Pennsylvania Company, which took over its assets and liabilities, thereby became fully paid.

'The Referee disallows the claim of Louis J. Bergdoll against the bankrupt for the sum of $300,000.

'The Referee allows the claim of Louis J. Bergdoll as a creditor of the bankrupt in the sum of $10,000.

(Sgd.) Richard S. Hunter, Referee.'

January 7th, 1915.

[fol. 150] 5. That the decision was not appealed from by either the Trustee or the claimant, and still remains unreversed.

6. That all of the averments of said petition, inconsistent with the foregoing, are specifically denied, and he denies that he was a stockholder of either of the corporations bankrupt at the time of the filing of the adjudication in bankruptcy or for some months prior thereto.

7. That it is now nearly three years since the decision of Honorable Richard Hunter in regard to the full payment of the stock of the Pennsylvania Corporation, and it is over four years since the Trustee and his counsel were familiar with all the facts of this case and nothing has been done by them until now.

8. This deponent asks that the said petition be dismissed.

And he will ever pray, etc.

Louis J. Bergdoll.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Louis J. Bergdoll being duly sworn according to law, deposes and says that he is the deponent above named; that the facts set forth in the foregoing answer to petition are just and true to the best of his knowledge and belief.

Louis J. Bergdoll.

[fol. 151] Sworn and subscribed before me this 30th day of October, A. D. 1917. Frank J. McMahon, Notary Public. Commission expires March 1st, 1919." (Notarial Seal.)

RECORD OF THE CLAIM OF LOUIS J. BERGDOLL, OFFERED IN EVIDENCE ON BEHALF OF THE DEFENDANT AT PAGE 76

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Bankruptcy. No. —

In the Matter of LOUIS J. BERGDOLL MOTOR COMPANY, Bankrupt

"Proof of Unsecured Debt

EASTERN DISTRICT OF PENNSYLVANIA, ss:

At Phila. in said Eastern District of Pennsylvania on the 9th (torn out) A. D. 1914, came Louis J. Bergdoll of Phila. in the

County of Philadelphia in said Eastern District of Pennsylvania and made oath and says that (torn out) Bergdoll Motor Co., the person, whom a Petition for Adjudication in Bankruptcy has been [fol. 152] filed, was at and before the filing of said petition, and (torn out) is justly and truly indebted to said deponent in the sum of Three hundred and ninety-five Thousand, eight hundred and sixty Dollars; that the consideration of said debt is as follows:

For moneys advanced from April 22nd, 1911, to March 8th 1912, to the Louis J. Bergdoll Motor Co. of New Jersey as per list of checks hereto attached marked 'Exhibits A. B. & C.' amounting to $462,860.00. That the Louis J. Bergdoll Motor Co. is entitled to credits of $2,000. and $70,000.00. $2,000 being cash paid for 20 shares of stock issued to the claimant, and $70,000. of cash paid by this deponent to the said Company for the stock and equipment of the 31st and Dauphin Street plant, leaving a balance due the claimant of $395,860, balance due for moneys advanced by claimant to the said Company, no part of which has been paid; and that no note has been received for said debt or judgment obtained against said bankrupt except as aforesaid; that no part of said debt has been paid; that there are no set-offs or counter claims to the same; and that said deponents has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

Louis J. Bergdoll.

Subscribed and sworn to before me this 9th day of March, A. D. 1914. Frank J. McMahone, Notary Public. My commission expires 2-21-1915." (Notarial Seal.)

[fol. 153] "District Court of the United States, Eastern District of Pennsylvania

In Bankruptcy. No. 4742

In re Louis J. Bergdoll Motor Company, Bankrupt

And now, April 14, 1914, comes Frank A. Harrigan, Trustee in Bankruptcy of the Louis J. Bergdoll Motor Company, Bankrupt, and objects to the claim filed by Louis J. Bergdoll in the sum of $395,000 for the following reasons:

1. That $300,000 of said amount was contributed by the claimant to the capital stock of the Louis J. Bergdoll Motor Company of New Jersey.

2. That certain items of said claim were paid by claimant to the said Bankrupt Company for merchandise bought from it.

3. That the item of $70,000 was in exchange for a check of the same amount issued by the Louis J. Bergdoll Motor Company of New

Jersey and given to the said Louis J. Bergdoll at the time the machine plant at 31st and Dauphin Streets was sold to the claimant.
(S.) J. W. Catharine, Attorney for Trustee.

[fol. 154] STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Frank A. Harrigan, being duly sworn according to law, deposes and says that he is the Trustee in Bankruptcy of the Louis J. Bergdoll Motor Company, Bankrupt and that the objection above given is verily believed by him to be well taken.

(S.) J. W. Catharine.

Sworn and Subscribed to before me this — day of April, A. D. 1914. Florence E. Thornton, Notary Public. Commission expires March 10, 1917." (Seal.)

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Bankruptcy. No. 4742

In the Matter of LOUIS J. BERGDOLL MOTOR CO., Bankrupt

Sur Claim of Louis J. Bergdoll for $395,860.00

The claim was for $395,860.00, for moneys advanced from April [fol. 155] 22nd, 1911, to March 8th, 1912, to the Louis J. Bergdoll Motor Co., of New Jersey. A list of checks was attached amounting in the aggregate to $462,860.00, and the Motor Company is credited with $2,000 cash paid to for twenty shares of stock issued to the claimant, and $70,000 of cash paid by the deponent to the company for stock and equipment of the 31st and Dauphin Streets plant, leaving a balance due the claimant of $395,860.00.

This claim was objected to by the trustee in bankruptcy, first, because $300,000 of the amount was contributed by the claimant to the capital stock of the Louis J. Bergdoll Motor Co., of New Jersey; second, because certain items of the said claim were paid by the said claimant to the said bankrupt company for merchandise bought from it; and third, because the item of $70,000 was in exchange for a check of the same amount issued by the Motor Co. of New Jersey, and given to Louis J. Bergdoll at the time the machine plant at 31st and Dauphin Streets was sold to the claimant. It appeared in evidence that, owing to an inadvertent double charge of $70,000 and $12,000, the real claim against the company was $310,000. It is admitted by the trustee that $10,000 represents an actual advance by Mr. Bergdoll to the Motor Co. of New Jersey; and the issue before the Referee is whether $300,000 was a loan by Bergdoll to the company, or a subscription to its capital stock.

The evidence under this head is found on pages 108 et seq., 214, 225, 229 et seq., 244 et seq., 254, et seq., and 264 et seq.

At a meeting held before the Referee on June 4th, 1913, Louis J. Bergdoll testified in answer to questions by the trustee, as follows:

Q. What was the capital of this corporation?

[fol. 156] A. Authorized capital $500,000.

Q. How much was actually paid in?

A. Capital paid in?

Q. Yes.

A. I think I paid in up to $300,000.

Q. Was stock issued for that?

A. Stock was issued for twenty shares.

Q. You say twenty shares, do you refer to certificate No. 1 for 18 shares, certificate No. 2 for one share to Charles A. Bergdoll, and certificate No. 3 for one share to George H. B. Martin?

A. Yes.

Q. How was the $300,000 paid in, by what?

A. Cash.

Q. You paid in $300,000 cash?

A. I did.

Q. Was any part of that $300,000 repaid to you?

A. Not of that, no.

* * * * * * *

Q. In the Stock Certificate book produced by you on the call of the other side, of the Louis J. Bergdoll Motor Co., as I understand you, you had paid in approximately $300,000 of capital?

A. Yes, sir.

Q. But there was only $20,000 of stock issued?

A. Yes, sir.

Q. Do you know of any impairment at all of the capital of the New Jersey Company down to the end of 1912? They asked if you had taken any out?

A. No. None whatever.

On page 115 et seq. Wade Kurtz, the bookkeeper of the bankrupt corporation gave evidence as to the transfer of the assets and liabilities of the New Jersey Corporation to the Pennsylvania Cor-

[fol. 157] poration under instructions from Mr. Mowitz, the attorney for the company, and upon producing the books testified that there was a capital stock account of $300,000 of the Pennsylvania Company under date of June 1st, 1912.

The assets are stated in detail and the list of liabilities is as follows:

Accounts payable	$52,746.75
Notes payable	35,681.72
Wages	2,404.11
Deposits	12,023.17
Louis J. Bergdoll loan account	10,000.00
Capital stock	300,000.00
a total credit to Louis J. Bergdoll Motor Co., the Pennsylvania corporation, of	$412,855.75

He testified also as to the change when Louis J. Bergdoll went out and Erwin R. Bergdoll and Charles A. Bergdoll came in. Robert McBurney was General Manager of the Bergdoll Motor Co.

The witness under cross-examination testified that he sent no notices to any of the people who were furnishing the motor company with goods that the New Jersey Corporation was no longer in existence. He knew of no such notices being sent. Bills were made out in the same way, and checks on the same bank account, the same bill heads being used. A new contract was printed, however, in 1913. The only completed printed contract of the Pennsylvania corporation was made with the Italian agent. The Pennsylvania charter hung on the wall of the company's office, and was the only public evidence of a change from one corporation to another. The dealer's contracts remained the same, because the [fol. 158] new contract which Mr. Bergdoll drew up contained a paragraph about a valveless motor and a deposit of $1,250, which were afterwards abandoned.

At a subsequent meeting Wade Kurtz, the bookkeeper of the company, testified as follows:

Q. After you had made an examination of the books of the Louis J. Bergdoll Motor Co., of New Jersey, in the fall of 1911, did you have a conversation with Louis J. Bergdoll with reference to his accounts as shown by the books?

A. Yes, we had two conversations. I went with Mr. Bergdoll on the 13th of September, 1911, and the books had not been posted from July 1st, 1911, and in posting up the cash book I found various items Louis J. Bergdoll, certain amounts. Going on a little further I found those items were marked 'Loan Account' and at that time I met Mr. Bergdoll in his office at Broad and Vine Streets, and I went to him one day and asked him about these accounts, whether they were capital stock or loans, and at that time Mr. Bergdoll told me that up to July 1st, or up to the $300,000, was capital stock and after that was loan account, so from July 1st on you will find that his contributions were all posted to the loan account. I find in going over the records that I marked the cash book. There is my own handwriting on page 2 of the cash book where I marked the items 'Loan Account.'

Q. Why did you mark them loan on this book, in consequence of what instructions and by whom did you do that?

A. By Mr. Bergdoll's.

* * * * * * *

After I had the books posted up, I went up to Mr. Bergdoll's house one day on other business, and I told him the amount of [fol. 159] his loan account, as I had it on my books. I don't remember the date, but I recall giving him the amount according to my books, and in order to verify that I asked Mr. Bergdoll whether that was the correct amount of his loan, and Mr. Bergdoll told me it was.

Q. I show you a letter dated March 11th, 1912, addressed to Mr. Wade Kurtz, signed by Louis J. Bergdoll, and ask whether you received that letter?

A. Yes.

The letter is offered in evidence and is as follows:

'March 11th, 1912.

Mr. W. Kurtz, Louis J. Bergdoll Motor Co., Philadelphia, Pa.

My Dear Sir: I am sending you herewith enclosed six copies of "Financial Statement" form. You will kindly fill out and sign two of these as of April 1st, 1912, and mail one to me while you keep the other for your company record; you will do the same on July 1st, and October 1st, being each quarter year for which the remaining four copies are enclosed.

Kindly see that this is done promptly and accurately.

Yours truly, Louis J. Bergdoll.'

Q. With that letter you received what forms?

A. Blanks of financial statement.

Q. How many of them?

A. Six.

Q. There are five here, what did you do with the other one?

[fol. 160] A. I sent that to Mr. Bergdoll.

Q. This financial statement I show you is dated April 1st, 1912, is that a correct copy of the original furnished to Mr. Bergdoll?

A. Yes, sir.

Q. I direct the Referee's attention to the last item of that statement "Paid in capital $300,000." That is a statement of the assets and liabilities of the company showing the paid-in capital of $300,000?

A. Yes, sir.

The financial statement was offered in evidence, and as to the liabilities is as follows:

For merchandise, open account	$52,266.74
For merchandise, closed by note	47,738.90
For borrowed money, to bank	9,300.00
For borrowed money, other than to bank	10,000.00
Contingent or sinking fund, deposits	17,175.83
Paid-in-capital	300,000.00
	$436,481.47

Signed by Louis J. Bergdoll Motor Co., Wade Kurtz.

Q. The next financial statement you sent to him was what?
A. July 1st, although I had statements every month. This statement was offered in evidence, and as to the liabilities is as follows:

Accounts payable	$47,391.38
Notes payable	35,083.82
Wages	2,008.93
[fol. 161] Deposits	10,609.00
Louis J. Bergdoll loan	5,000.00
	100,093.13
Present worth	129,496.31
Deficiency Account	170,503.69
Capital stock	$300,000.00

Q. Did you send a copy of that to Mr. Bergdoll?
A. I don't just recall the particular instance, but as testified before I must have sent it.
Q. The assets here are stated at $229,589.44, liabilities $100,093.13, showing a capital stock of $300,000.00?
A. That is right.
Q. What is the next statement?
A. October 1st, 1912.

The statement was as follows:

Resources and Liabilities October 1st, 1912, Louis J. Bergdoll Motor Company

Assets:

Cash	$5,244.87	
Stock	141,508.64	
Trucks & Demonstrators	3,700.00	
Machinery & Tools	4,594.90	
Equipment	7,822.25	
Notes Receivable	1,400.00	
Accounts Receivable:		
Bergdoll M. C. Co. of N. Y.	18,078.08	
Bergdoll Car Co. of Mis.	11,000.60	
Miscellaneous	11,374.11	
		$204,723.45
[fol. 162] Liabilities:		
Accounts Payable	23,357.59	

Notes Payable:			
Central Trust	$25,000.00		
Miscellaneous	21,281.41		
		46,281.41	
Wages		1,718.98	
Deposits due Agents		7,740.11	
Louis J. Bergdoll Loan		5,000.00	
			84,098.09
Present worth			120,625.36
Deficiency Account			179,374.64
Capital Stock			$300,000.00

Q. This statement book contains the original statements, did you send a copy to Mr. Bergdoll?

A. Same answer as before. I certainly must have.

Q. That is a statement of resources and liabilities October 1st, 1912, assets, $204,723.45, liabilities $84,098.09, that shows capital stock of $300,000.00?

A. Yes, sir.

Q. The next statement which you prepared and sent to Mr. Bergdoll?

A. I think that is the last one Mr. Bergdoll received.

Q. Will you turn to the accounts of April and May, 1912, and state to the Referee what assets and liabilities were transferred by the New Jersey Company to the Pennsylvania Company at that time these are entries made by yourself?

A. Yes. Page 61 of the cash journal of the Louis J. Bergdoll Motor Co., of Pennsylvania.

Q. First turn to the account of the New Jersey Company in the general ledger, take the capital stock of the New Jersey Company, and that is what?

[fol. 163] A. $300,000.

Q. Do you mean paid-in?

A. Yes, capital stock July 1st, balance of $300,000.00.

Q. Turn to the personal account of Louis J. Bergdoll, 2205 Green St., Philadelphia, and state what that account is?

A. That is Mr. Bergdoll's personal loan account of moneys advanced to the company outside of the capital stock.

Q. Between what dates?

A. Between July 1st, 1911, and February 16th, 1912.

Q. The total amount of loans advanced are how much?

A. $92,000.

Q. Turn to the account showing the transfer of the assets and liabilities from New Jersey to the Pennsylvania Company, that is in what book?

A. Page 61 of the Louis J. Bergdoll Motor Co. of Pennsylvania cash journal.

Q. What does that show?

A. It is headed "Sale of the Louis J. Bergdoll Motor Co. of New Jersey to the Louis J. Bergdoll Motor Co. of Pennsylvania."

Cash	$6,123.77
Stock (material)	186,464.47
Machinery and tools	3,312.26
Equipment	7,628.23
Accounts receivable	48,359.61
Notes receivable	4,795.44
Advertising	600.00
Adjustment account (which is deficiency account)	155,571.97

[fol. 164] Liabilities:

Accounts payable	52,746.75
Notes payable	35,681.72
Wages	2,404.11
Deposits	12,023.17
Louis J. Bergdoll Loan Account	10,000.00
Capital	300,000.00
Total	$412,855.75

Q. What is meant by that adjustment account of $155,571.97?

A. That is the deficiency account, which is the difference between the present worth of the paid-in capital.

Q. The difference between the total value of the assets and the amount of capital contributed?

A. Yes, that is the loss, which is put in there as a bookkeeping entry.

Q. In the Louis J. Bergdoll personal account, you stated that the total paid-in of the loan account was $92,000, and here the transfer shows the amount of his loan account under date of May 31st, at $10,000?

A. Yes.

Q. How do you account for the difference between the amount stated as $92,000, from the ledger of the Louis J. Bergdoll Motor Co. of New Jersey, and the account in the cash journal under date of May 31st, 1912?

A. That difference is caused by the sale of the plant No. 2 to Mr. Bergdoll.

Q. What plant?

A. 31st and Dauphin Streets plant. He charged his loss account with the sale of plant No. 2, which was $82,000.

[fol. 165] The trustee then produced the capital stock book of the Pennsylvania company, and offered in evidence certificate No. 1, for 2,998 shares of the capital stock of the Louis J. Bergdoll Motor Co. full-paid and non-assessable, issued to Louis J. Bergdoll, April 1st, 1912, and signed by Louis J. Bergdoll, president, and E. Lawrence Webster, secretary. Also certificates Nos. 2 and 3 for one share each issued to E. Lawrence Webster and Frank J. Fanning. Also certificates Nos. 4, 5 and 6, the first being for 2,998 shares, issued to Erwin R. Bergdoll, No. 5 being to Charles A. Bergdoll for one share, and No. 6 being issued to Grover C. Bergdoll.

The witness then testified to crediting the plant with $70,000 and $12,000 and charging Mr. Bergdoll's loan account with the same amount.

On cross-examination by counsel for the claimant, the witness was asked whether he did not know that only $20,000 of stock was ever issued of the New Jersey stock. He answered: 'As far as the stock certificates are concerned, I know nothing but the books show capital stock issued of $300,000. The certificates I never saw, to my knowledge.'

In answer to the question 'Show me that entry in the book that certificates of capital stock were issued to the amount of $300,000?' he replied, 'It shows here that there was capital stock paid in of $300,000.'

Q. I ask you how much capital stock was issued. Is there any account on any of the books that you have ever seen that indicates the number of shares of capital stock that was issued?

A. No, sir.

Q. I understood you to say that you never saw the stock book?

[fol. 166] A. No, sir.

The trustee admitted that the New Jersey Company only issued certificates of stock to the amount of $20,000.

Louis J. Bergdoll was then recalled and asked by the trustee to produced the books from which the account attached to the proof of claim was made up. He replied, 'The only book I have is the bankbook and the stubs of checks, and cancelled checks from April 22nd, 1910.' Witness had no ledger or cash book individually, and never had any books which showed the transactions other than those before the Referee.

At a subsequent meeting after offering the ledger showing the transfer from the New Jersey to the Pennsylvania Corporation, and the account of the Pennsylvania Corporation, the book and journal showing the transfer to the Pennsylvania Company from the New Jersey Company of the assets and liabilities, the trustee offered in evidence the report of Lawrence E. Brown & Co., under date of December 22nd, 1911, to the Louis J. Bergdoll Motor Co. This report was produced and offered in evidence. The material part is the statement of the financial condition October 23rd, 1912, in which the assets and liabilities are stated thus:

Financial Condition October 23rd, 1911

Assets:

Cash (general and petty combined)	$2,067.21
Accounts Receivable, Statement "B" annexed hereto	46,204.84

Inventory (material & work in process):		
[fol. 167] Stock, Plant #1	$140,472.91	
Stock, Plant #2	30,819.95	
Work in process plant #1	136,169.02	
Work in process	26,821.79	
		214,283.67
Machinery & Tools:		
Plant #1	2,303.21	
Plant #2	45,037.58	
		47,340.79
Equipment:		
Plant #1	7,224.66	
Plant #2	4,021.46	
		11,246.12
Patterns		626.56
Fuel		23.78
Stationery, etc.		553.72
		$322,336.69
Liabilities:		
Agents' Deposit Accounts, Statement "C" annexed hereto	21,874.48	
Accounts Payable, Statement "D" annexed hereto	124,887.96	
Notes Payable, Statement "E" annexed hereto	14,446.35	
Louis J. Bergdoll loans	64,000.00	
		225,208.79
Net assets		$97,127.90

Summary

Capital stock paid in	$300,000.00
Net assets, as above	97,127.90
Net Loss	$202,872.10

At a subsequent meeting Louis J. Bergdoll was recalled by his [fol. 168] counsel, and asked how many shares of stock were issued in the New Jersey company. His recollection was there were twenty shares. He was asked whether he ever authorized or the company ever authorized the issuance of any other stock. He replied, 'No.' He was then asked 'The balance of the money that was paid in by you was it considered by you as a contribution to capital stock, or by what was it considered by you?' Under objection he answered, 'It was considered by me as money advanced; that is all.'

Q. Did you ever authorize the transfer of any part of the various amounts into the capital account, to be considered as capital?

A. I did not authorize the transfer of any part of the various amounts into the capital account, to be considered as capital.

Q. Did you ever authorize the exchange from the New Jersey Company to the Pennsylvania Company as testified to by Mr. Kurtz, was that done at the suggestion of Mr. Mowitz?

A. I think he said Mr. Fanning. I did not authorize any change.

The witness then testified in answer to questions from the trustee's counsel as to the incorporation of the Pennsylvania company, as to his taking the 2,998 shares of the capital stock. The charter was taken out at the direction of Mr. Webster, Mr. Fanning and the witness, and the object of taking out the Pennsylvania Corporation was to do away with the foreign attachment suits which we had under the New Jersey Corporation, and to take over the business that was then being conducted by the New Jersey Company.

Q. What you wanted to avoid was the re-occurrence of the foreign [fol. 169] attachments being directed against the New Jersey Company?

A. Against the business.

At a subsequent meeting the stock books of the New Jersey Company were produced and offered in evidence, and showed three certificates filled out and detached from the stubs, but still in the book. No. 1 was for 18 shares of the capital stock issued to Louis J. Bergdoll, No. 2 for 1 share issued to Charles A. Bergdoll, No. 3 for 1 share issued to George H. B. Martin, all of them dated March 4th, 1910, under the seal of the company; the other certificates being intact and not having been written on. The cash book of the Louis J. Bergdoll Motor Co. of New Jersey was also offered, showing the credits to Bergdoll of various sums of money, certain items marked 'Loan Account.'

The Referee summarizes the evidence as follows:

The Louis J. Bergdoll Motor Co. of New Jersey was incorporated in March, 1910, with a capital stock of $500,000. Twenty shares of stock were issued, eighteen to Louis J. Bergdoll, one each to Charles A. Bergdoll and George H. B. Martin. No other certificates of stock were issued. Between the date of the organization of the company and March, 1912, the claimant advanced to it the sum of $392,000. $300,000 of this amount was credited on the books of the company as a contribution to the capital stock, and $92,000 as loans to the company.

Louis J. Bergdoll testified before the Referee that he paid in $300,000 of this advance upon the capital stock of the company. Wade Kurtz, the bookkeeper, had two conversations in 1911 with Louis J. Bergdoll in which Bergdoll told him that the contributions [fol. 170] and advances made by him up to $300,000 were capital stock, and above that to loan account. The entries in the cash book designating the amounts to which the contributions should be credited, were made in consequence of instructions given to Kurtz by the claimant. Kurtz reported to the claimant the amount of his loan account, and was told that it was correct.

This testimony was not directly contradicted by the claimant.

In the autumn of 1911, Lawrence E. Brown & Co., public accountants, investigated the financial affiairs of the company, and submitted its report to the claimant as of October 23rd, 1911, showing capital stock paid in of $300,000 and loans from Louis J. Bergdoll then amounting to $64,000. This loan account was increased thereafter to $92,000. On March 11th, 1912, the claimant wrote Kurtz a letter, enclosing blank forms to be used in the preparation of statements for April, July and October 1st, 1912; one copy to be sent to him and one copy kept for the company's records. These statements were submitted to the claimant, and on each one the capital was stated at $300,000, and the Louis J. Bergdoll loan was stated as $10,000; the reduction from $92,000 to $10,000 being in consequence of two charges of $70,000 and $12,000 respectively for the sale and transfer of certain machine plant to the claimant. On May 31st, 1912, the assets and liabilities of the New Jersey Corporation were transferred to the Pennsylvania Company then newly organized. Among the liabilities transferred was the Louis J. Bergdoll loan account of $10,000. The amount paid to the New Jersey Company on account of capital stock was stated at $300,000. For the property thus transferred the Pennsylvania Com-
[fol. 171] pany issued 3,000 shares of full-paid, non-assessable stock of the par value of $100; Louis J. Bergdoll receiving 2,998 shares and Frank J. Fanning and E. Lawrence Webster one share each.

The conclusion of these facts appears irresistible, that it was the intention of Louis J. Bergdoll to contribute $300,000 to the capital stock of the New Jersey Company. Every circumstance above detailed points to this intent, and the only evidence against it is the very guarded denial of Mr. Bergdoll.

Counsel for the claimant argues, however, that the claim is against the New Jersey Corporation, having nothing to do with the Pennsylvania Company, and that under a recent decision of the District Court claims could be presented against both corporations. He also argues that there can be no capital stock of a corporation unless stock certificates are issued.

It does not follow, however, because the creditors of the New Jersey Corporation can follow the assets of that corporation in the hands of the Pennsylvania Corporation, which is unquestionably the law, that this particular claim could be considered a debt of the New Jersey Corporation rather than a contribution to its capital stock. These two contentions are not, as the Referee views it, in pari materia. Neither is it material that no stock certificates of the New Jersey Corporation were actually issued beyond the first twenty. The fact that the claimant himself, both in his direct testimony and before the Referee and in his statements as sworn to by Mr. Kurtz, declared that the $300,000 was contributed to the capital stock of the corporation; the various reports which were submitted to him to the same effect without objection; the state-
[fol. 172] ment of the public accountant, also submitted to him, and passed by him, all point to the same conclusion.

The Referee finds that the sum of $300,000 was contributed by Louis J. Bergdoll to the capital stock of the New Jersey company,

and that the stock of the Pennsylvania company, which took over its assets and liabilities, thereby became fully paid.

The Referee disallows the claim of Louis J. Bergdoll against the bankrupt for the sum of $300,000.

The Referee allows the claim of Louis J. Bergdoll as a creditor of the bankrupt in the sum of $10,000.

Richard S. Hunter, Referee.

January 7th, 1915."

[fol. 173] RECLAMATION PROCEEDINGS, OFFERED IN EVIDENCE ON BEHALF OF THE PLAINTIFF AT PAGE 90

"IN THE DISTRICT COURT OF THE UNITED STATE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Bankruptcy. No. 4742

In the matter of LOUIS J. BERGDOLL MOTOR COMPANY, Bankrupt

Sur Petition of Louis J Bergdoll Motor Company of New Jersey

The Referee to whom the petition was referred to take testimony as to the title of the property in the receiver's hands, respectfully reports:

The Louis J. Bergdoll Motor Company of Pennsylviania was adjudged a bankrupt on March 17th, 1913, and the matter referred on April 13th, 1913, to this Referee. On the said bankrupt Frank A. Harrigan, Esq., was appointed receiver and took possession of the property of the bankrupt.

On May 7th, 1913, the Louis J. Bergdoll Motor Company of New Jersey entered a petition in the office of the District Court, averring that the petitioner had been in business in Pennsylvania since its organization in February, 1910, and was duly authorized by registration [fol. 174] to do business in the State of Pennsylvania, that the receiver of the Pennsylvania Corporation had taken possession of the personal property of the petitioner on the premises at 16th and Callowhill Streets, and had advertised goods and chattels of the petitioner for sale on May 14th and 15th, 1913, as the property of the Pennsylvania Corporation. The petitioner averred that the said property was not the property of the Pennsylvania Corporation, but was the property of the petitioner; and prayed that the matter of the title to the said goods and chattels should be referred to the Referee, in order that testimony might be taken and that the goods and chattels should be delivered to the petitioner upon proving its title thereto, and that the said sale be postponed pending the said reference.

The Court, on May 9th, 1913, ordered this petition to be referred to the present Referee to take testimony as to the title of the property in the receiver's hands, the sale not to be postponed, however. The sale took place upon the days appointed, and was duly confirmed by the Court.

At the first meeting before the Referee on April 29th, 1913, A. P. Mowitz, Esq., appeared and averred that he was counsel for the bankrupt, and as such had authority to file its schedules. Mr. Mowitz, testified that he had represented the New Jersey Corporation for upwards of two years; that when the new corporation was formed it was done without his knowledge. Witness had always represented the New Jersey Company since it started in business. Witness was informed the first time at the time of the filing of the petition in bankruptcy that Louis J. Bergdoll was no longer president of the corporation. The witness was requested by Mr. Hubert, the president of the company, and also by the general manager and the principal [fol. 175] stockholder, to represent the company in the preparation of the schedules in bankruptcy. There was no resolution of the board of directors to this effect. The witness called the attention of the officers of the company to the fact that the petition in bankruptcy had been filed and was referred by Mr. Hubert to the general manager, Mr. McBurney. Witness had not seen Mr. Hubert since that time. Witness testified under cross-examination that he believed Mr. Hubert and Mr. Taig were the directors of the bankrupt company. Mr. Hubert was the bookkeeper in the employ of Emma C. Bergdoll, and Mr. Taig was secretary and treasurer. The witness was never consulted about the directorship of the company, or any change of directors. On the appointment of a receiver the witness appeared for Louis J. Bergdoll, personally, and for the North Broad Street Realty Company, the owner of the building where the bankrupt was, and had brought suit on an outside matter within a week previous to the meeting, on behalf of the Bergdoll Taxicab Company. He stated, however, that his retainer was paid up until the first of May, and his relations with the company ceased on that date. On being asked why, having been continuously for three years the counsel for the company, in such an important matter as the incorporation of a new company, he had nothing to do with it, he replied, 'You are evidently not familiar with the way the Bergdoll people do business.' Witness had no knowledge of the stock certificate book; had never seen it. He added, 'there was never anyone consulted about corporate matters. I think Mr. Bergdoll undertook those things himself, and no one would receive notice until they were done. I say to you now that I was never consulted about any corporate matters of any company. The difficulty with Mr. Bergdoll [fol. 176] is that he has had a little knowledge of the law which is dangerous.' The witness declared positively that he had ceased to be counsel for Louis J. Bergdoll, who had gone to John Weaver, Esq., and witness had turned over all matters to Mr. Weaver.

Upon this testimony, Mr. Mowitz was authorized to file the schedules of the bankrupt. At a subsequent meeting held before the Referee on May 5th, 1913, to pass upon the sale of certain of the bankrupt's assets in Chicago, Mr. Weaver representing the New Jersey Corporation and Louis J. Bergdoll, desired that the sale should go on, and the assets be held in such a way that the New Jersey Corporation might make claim to them. At the first regu-

lar meeting under the Act, held before the Referee on May 16th, 1913, schedules were produced signed by the president of the company, and accompanied by a note stating that the president had been advised and informed that the assets seized by the receiver as the property of the bankrupt, were in fact the property of the New Jersey Corporation, and that he signed the schedules without prejudice. At this meeting, Mr. Harrigan was elected trustee.

The next meeting was held under the reclamation petition. The first witness called was Frank J. Fanning. He testified under examination by Mr. Weaver that he had the title of vice-president and general manager of the New Jersey Corporation from about November 1st, 1911, until March 7th, 1912; never attended any meetings or knew of any meetings. He did not have control as general manager of the property and business of the concern, but was employed to carry out the instructions of Louis J. Bergdoll, and make whatever suggestions were in his opinion necessary for the management of the business. Mr. Louis J. Bergdoll was president of the company. Witness did not know who the other officers [fol. 177] of the New Jersey Corporation were. His position was an appointment. The officers were shifted around. 'Mr. Bergdoll would appoint them and change them around as he saw fit.' When pressed as to the names of his fellow officers, he said, I think Mr. McGlave was the treasurer to begin with.' As to the secretary he said, 'that might have been Mr. Webster. I don't know. I am only guessing at it. I never saw their names in a book, attended a meeting, or knew anything about the incorporation part of the business. Mr. Bergdoll is a graduate of law, and he always assumed to handle that proposition, and never asked my advice.' On being asked who attended to the business at the place when Bergdoll wasn't there, witness answered, 'I used to see him three or four times a week, every week, and there was no action or move made that I didn't make a memorandum and take it up, and discuss it with him, and act according to his decision.' Witness testified that the Pennsylvania Corporation was incorporated on March 18th, 1912, and that he was, he believed, one of the incorporators. Between the end of January, 1912, and the first of January, 1913, his position did not change as vice-president and general manager. It continued until December, 1912, when he received a letter as follows:

'Mr. Frank J. Fanning.

DEAR SIR: This is to inform you that Chas. A. Bergdoll and Erwin R. Bergdoll have been appointed Executive Committee with authority to manage the affairs of the Louis J. Bergdoll Motor Co.

Kindly give your co-operation, and oblige,

Yours truly, (Signed) Louis J. Bergdoll, President.'

[fol. 178] On February 7th, 1913, the witness made a new deal with the company, in which he had the title of sales manager, and was to sell their cars for $25.00 per car, without compensation for salary or expenses. This agreement was signed by C. A. Bergdoll, treasurer.

The witness was handed a paper called a Monthly Report of the Louis J. Bergdoll Motor Company, dated August 31st, 1912, and testified that it was a monthly statement prepared by Mr. Kurtz, the bookkeeper, and signed by the witness, giving a statement of sales of general merchandise. Mr. Kurtz sent this to Mr. Bergdoll at his direction. The witness signed it because he was requested by Mr. Bergdoll to do so. Mr. Kurtz, the bookkeeper, made up the reports and Kurtz told the witness that Mr. Bergdoll wanted him to sign them. Witness identified similar reports made in January, 1912. The witness paid little attention to these reports, and as he recalled it, they would accumulate for several months, and the witness would sign several at a time. Most of the witness' time was used in keeping the business alive and financing it.

The witness remembered the incorporation of the Pennsylvania Company, and stated it as follows:

When I went over to take an active part in the business, about the first of November, 1911, we were very heavily in debt. We had no credit to speak of. We couldn't buy a set of tires on the street on credit. There were a number of accounts in lawyers' hands for collection. I used to come down to the office in the morning and find some sheriff in there with a writ of attachment on some foreign corporation, so I discussed the matter with Mr. Bergdoll as to the advisability of making a Pennsylvania corporation, on account of [fol. 179] the trouble we would have in these attachments; so he said he would have it made into a Pennsylvania Corporation. Along in March he sent the Pennsylvania charter down to my office, through Mr. Kurtz. Mr. Kurtz got the Pennsylvania charter and brought it into my office. A short time later, Mr. Louis J. Bergdoll asked me whether I had the charter up in my office, and I told him I had. He says, 'If they ever make a foreign attachment, you point to the charter and say that you make an attachment at your peril.'

The witness had one share of stock in the Pennsylvania company. Mr. Webster had one share, and Mr. Bergdoll the rest. Witness never attended any meetings of any of the directors of either company, or ever heard of any such meetings. As sales manager, the witness executed contracts with dealers, until the time he left there, and on being shown a dealer's contract dated August 16th, 1912, between the New Jersey corporation and Alvin G. Graff, he identified the contract, but said it was not prepared or negotiated by him, and was never executed. Another contract dated October 30th, 1912, between the New Jersey Corporation and Charles J. Russell was shown him dated October 30th, 1912, which he declared was duly executed. The execution consisted in all cases of the signature of Louis J. Bergdoll as president. Under his last contract the witness remained as representative of the company until the time the receiver was appointed, and his last contract as sales manager was made in February or March, 1912. He was then asked, 'And all the contracts which you made this year, in 1913, with any of the dealers, was made between the Louis J. Bergdoll Motor Company of

Philadelphia, Pa., a corporation organized and existing under the [fol. 180] laws of the State of New Jersey having its principal office and manufacturing plant in Philadelphia, Pa., and so designated in the contract which you made, was it not?' He answered, 'We happened to have this form of contract convenient for use. That is the reason it was used.' He then testified that the contract which was marked 1912 Dealer's contract, 1912, was erased and 1913 written over it was used because we had this contract 'already printed.' That Mr. Bergdoll got up a new contract for the Pennsylvania Corporation, in which there were some errors. 'In other words, he described a car as a valveless car, which he thought we were going to build, and never got out, and the only printed contract we had was the 1912 contract. * * * We were trying to operate on an economical basis, and as I had a lot of these 1912 on hand, I thought we could use them and change them to conform with the 1913 contract.' Witness never saw a certain agreement between the New Jersey Corporation and the Warner Gear Co., dated the 7th of February, 1923. Witness upon request produced his appointment as sales manager, which contained no mention of any dismissal or resignation as vice-president and general manager. He was asked 'Did you resign as vice-president and general manager?' He answered, 'No, I suppose they have the right to depose me of it the same as they had the right to confer it. I was appointed by word of mouth and deposed by word of mouth.'

The witness had a talk with Mr. Louis J. Bergdoll with reference to the transfer of the property of the New Jersey Company to the Pennsylvania Corporation about May, 1912. Bergdoll instructed him to have the bookkeeper, Mr. Kurtz, open up a new set of books. [fol. 181] The corporation used what they call a loose-leaf ledger system, so that they did not throw away old books, but had new leaves. Witness was instructed by Louis J. Bergdoll to tell Mr. Kurtz to open a new set of books for the Pennsylvania Corporation, and to transfer the assets of the corporation from the New Jersey books to the Pennsylvania books. Bergdoll did not go into details; that was up to Mr. Kurtz. The new books were the same as the old ones, but the general accounts were taken from the old books which ed loose leaves. Witness and Mr. Kurtz took the old leaves out as a matter of economy. All the leaves that were written on up to May, 1912, were taken out and new leaves were put in the same cover. The check book and bank book used by the old company were continued in use and no change was made. Witness identified a contract dated December 30th, 1912, between the New Jersey corporation and the Bergdoll Motor Company, of Boston, witnessed by him, duly executed.

In answer to the trustee witness testified that the New Jersey Company was engaged in the manufacture and sale of motor cars at 16th and Callowhill Streets, and 31st and Dauphin Streets, Philadelphia. The Pennsylvania Company was engaged in the same business at the same places. That they manufactured the same parts of materials; that Louis J. Bergdoll owned the stock in the corporation. Louis J. Bergdoll owned all the stock of the Pennsylvania

Corporation, except the share issued to the witness. That the Pennsylvania Corporation had a seal, kept in Mr. Louis J. Bergdoll's possession at his home. That the Pennsylvania Corporation did business, and assumed and paid the debts of the New Jersey Corporation; borrowed money, $25,000 from the Central Trust & Savings [fol. 182] Co., and used the money to pay debts which were contracted prior to March 18th, 1912. For this loan a second mortgage was given on the building at 16th and Callowhill Streets by the North Broad Street Realty Company, whose president was Louis J. Bergdoll. $3,300 was deducted from the $25,000 on account of taxes due on the property. Witness had seen the imprint of the seal of the Pennsylvania Corporation, and on being handed the note of $25,000 to the order of the Central Trust & Savings Co. signed Louis J. Bergdoll Motor Company, by Louis J. Bergdoll, president, attest, H. H. Sharp, secretary, identified the seal of the Pennsylvania Corporation, and stated that this was the loan that was used in the business of the Pennsylvania Corporation. Witness identified the signature of Louis J. Bergdoll on the note. On being asked who was the treasurer of the Pennsylvania Corporation in May, he said, 'I think Mr. Webster.' He testified that Mr. Bergdoll was the treasurer in fact, signed all the checks and attended to all the financial arrangements. There were no directors' meetings of the New Jersey Corporation. The witness was appointed vice-president and general manager of the New Jersey Corporation by Louis J. Bergdoll informally immediately before the first of July, 1912. At that time he was running a retail business. Bergdoll and he were good friends, and witness went over on the solicitation of Mr. Bergdoll to sell the cars. Bergdoll offered him a salary and commission on the cars. When he got over there he found the business was so hopelessly in debt that he told them he did not want a salary, but would take a commission on the cars and run his own business. Witness advised him to change managements, which Mr. Bergdoll did. Then about the first of November, [fol. 183] witness was appointed vice-president and general manager. He took particular pains to explain to the agencies that the company had been changed from a New Jersey to a Pennsylvania corporation.

This was for the purpose of getting credit, and to avoid foreign attachments. Louis J. Bergdoll had some knowledge of the law, and had prepared a memorandum of agreement between the Pennsylvania Corporation and Italo Inglese, of Genoa, Italy, and sent them down to the office with instructions to use them. It turned out that they described some cars which the corporation failed to bring out, so that the contract could not be used. Witness never saw the seal of the New Jersey Corporation, nor the Minute Book of either corporation, nor the Stock Certificate Book of either corporation, except when the book of the Pennsylvania Corporation was brought into the office to endorse for one share held in the witness' name. On re-examination by Mr. Weaver, the witness testified that he saw contracts made with the Pennsylvania Company by himself, and the seal of the Pennsylvania Corporation put on the contract by Louis J. Bergdoll; that he had been instructed by Mr.

Bergdoll on numerous occasions to make all his contracts for the Pennsylvania Corporation. In answer to the question, 'Can you produce a single contract not made by you, with anybody as an officer of the Louis J. Bergdoll Motor Company, a Pennsylvania corporation,' he produced a contract with the United States Heat & Lighting Co., and testified that that company executed a contract, and asked for the seal of the corporation to be put on it. The witness took it to Mr. Bergdoll, and Mr. Bergdoll went up to the second floor and got the seal of the corporation, brought it down to the first floor and put the seal upon it. This was the only [fol. 184] one in which the seal was required. Witness explained that the contracts printed were not all used up, and that the New Jersey contract — used by oversight. 'We had these contracts on hand when the contracts for the Pennsylvania Corporation were printed, and as they were incorrect, we used the New Jersey contract.' This took place in about a dozen cases. Witness testified that there was no written contract with the Louis J. Bergdoll Motor Company for his employment as vice-president and general manager. There was no change in his employment in any way, shape or form, either verbally or in writing at any time during 1912. In answer to Mr. Harrigan, the witness said that the expenses of the incorporation of the Pennsylvania Corporation were paid out of general funds of the company, and that the title conferred upon him as the same thing in both companies. That the Pennsylvania charter was put upon the wall openly and notoriously; that the New Jersey charter was never in the building; that Mr. Mowitz was counsel for the New Jersey and the Pennsylvania Corporation; that the payments made to the witness came from the Louis J. Bergdoll Motor Company, without any distinction as to whether it was a Pennsylvania or a New Jersey corporation.

At the next meeting, Louis J. Bergdoll was sworn and examined by his counsel. He testified that he was president of the New Jersey Corporation. In answer to the question 'State whether the New Jersey corporation ever authorized the transfer of any of its assets to a corporation known as the Louis J. Bergdoll Motor Company, a corporation organized under the laws of the State of Pennsylvania?' he answered, 'no.' 'Do you know whether the New [fol. 185] Jersey Corporation ever did in fact transfer to the Pennsylvania Corporation any of its assets?' 'I don't know.' There were no meetings of the directors, and none of the officers ever executed a bill of sale to the Pennsylvania Corporation for the assets of the New Jersey Corporation. The other officers of the New Jersey Corporation were Charles A. Bergdoll, his brother, and E. Lawrence Webster. Mr. Fanning was general manager. He continued so until the end of 1912. After the adjudication in bankruptcy, the witness learned the facts at the Post Office Building that the proceedings were commenced against the Pennsylvania Corporation, and not against the New Jersey Corporation. Mr. Fanning's duties were general manager of the New Jersey Corporation, 'to take full management of the active operation of the business. The first two or three months that Mr. Fanning was with the company, I attended

the office of the company regularly, almost daily, until I took sick in September of that year, 1911. After that the entire management was left up to Mr. Fanning.' Mr. Fanning was not employed merely to carry out the witness' instructions, but to consult with him as to any matter on which he was in doubt, and to run the business to the best of his ability. In answer to the question, 'Mr. Fanning has testified that he never knew that you were sick: he knew you were at home a good deal of the time, but that was a matter of preference, please state if that is correct,' he answered, 'Mr. Fanning called on me at my home when I was laid up in my bed on matters which he was to confer with me.' In answer to Mr. Fanning's testimony that the matters of incorporation and all the transactions in regard to it were left to the witness, the witness said that at the time of the incorporation of the Pennsylvania Company, 'I was [fol. 186] confined to the house, and Mr. Fanning was one of the incorporators.' The witness thought that after Mr. Fanning's appointment as general manager of the company there was a meeting of the New Jersey Corporation, when there was a change of secretaries. There were minutes taken of the meeting, but they were left at the plant at 16th and Callowhill Streets. The witness denied that he instructed Fanning to sign monthly reports, but that he was asked to verify the truthfulness thereof by signing them. Mr. Fanning was looked to for the reports, and it was his duty to have them made up either by himself or some one under him. In answer to the question, 'Did you ever instruct Mr. Kurtz to have Mr. Fanning sign the reports?' he answered, 'No, not that I know of. I may have returned an unsigned report for that purpose, but I don't recollect ever instructing him specially to have Mr. Fanning sign the reports.' There was one meeting of the directors of the Pennsylvania Corporation for the purpose of formal organizations, for the forming of the board of directors. No business was transacted at that meeting looking to the acquisition of the Pennsylvania Corporation of the assets of the New Jersey Company. As to the contract with the United States Heat and Lighting Co. the witness did not remember seeing the paper, and wouldn't authorize Mr. Fanning to execute a contract. Witness executed all the contracts himself as president. As regards the opening of the new set of books by Kurtz, witness denied that he instructed Kurtz to have them opened. He also denied that he had told Fanning to tell Kurtz to open a new set of books for the Pennsylvania Corporation, and to transfer the assets. He did not know that a new set of books [fol. 187] for the Pennsylvania Corporation were opened. There was no change in the bank account from the New Jersey Company to the Pennsylvania Company. The seal of the New Jersey Corporation was kept at the office of the company until the latter part of the year, 1912, then it was sent to the witness' house. The note given to the Central Trust & Savings Co. was on the 14th of September, 1912. The Pennsylvania seal was kept at the plant. Witness did not know he attached the seal which was affixed to the note of the Central Trust & Savings Co. On being asked, 'Did you do it,' he answered, 'No, not to my knowledge.' The

witness never gave Mr. Fanning any instructions to execute any contracts. In answer to Mr. Fanning's testimony as to the United States Heat and Lighting Co., witness said, 'I don't know anything about it.' Witness knew of no act on the part of the New Jersey Corporation looking to the transfer of its assets to the Pennsylvania Corporation, nor of any act of the stockholders or officers of the Pennsylvania Corporation accepting or taking over any of the assets of the New Jersey Corporation.

On cross-examination by Mr. Harrigan, he said that he was president of the North Broad Street Realty Company, E. Lawrence Webster was secretary and treasurer. The officers of the Pennsylvania Corporation were himself, Fanning and Webster. Witness signed the note to the Central Trust & Savings Co. and the North Broad Street Realty Company, of which he was president, gave the collateral mortgage to secure it. Witness had no knowledge of putting the seal on the note, but wouldn't swear that he didn't put it on. A moment afterwards he swore he never used it. Witness was asked [fol. 188] whether the Pennsylvania Corporation transferred its assets, and he answered, 'Not to my knowledge, it did not.' "Did the Pennsylvania Corporation ever do any corporate act at all?

He answered, 'Well, I say that it did not.' 'Would you be surprised if it was shown that you have attached this seal to other documents?' 'I believe I would be surprised.' Witness was then referred to certificate No. 1 of the Pennsylvania Company for 2,998 shares, and asked in whose handwriting that certificate was. He answered that it was his own handwriting, and the seal attached was the seal of the Pennsylvania Company. On being asked whether he attached that seal, he answered he did not recollect.

'Q. Will you say that you did not attach the seal?'

'A. I wouldn't say that I did not. I don't recollect.'

'Q. Did you see it attached?'

'A. I wouldn't swear that I did.'

He gave the same answer as to certificate No. 2 for one share, and certificate No. 3 for one share. He was then asked, 'What consideration did the Louis J. Bergdoll Company of Pennsylvania get for 2,000 shares of its capital stock that you issued?'

'A. Did not get anything so far as I know. It was part of the plan of making the New Jersey Corporation a Pennsylvania Corporation.' On being asked 'What consideration did the Pennsylvania Corporation get for that 2,998 shares of stock issued to him?' The witness answered 'None, so far as my knowledge is concerned.'

'Q. Did the New Jersey Corporation make a report to the State of New Jersey as to its business that it had done in 1911?' He answered, 'I am not sure of that.' He did not remember that he held 2,998 shares of the company, but said he was the majority stockholder. 'There was one meeting of the board of directors of the New [fol. 189] Jersey Company for change of secretaries. That was the only important resolution of the board of directors that I recall.' He wouldn't say when it was. He was asked, 'Isn't it a fact that the other two shares in the New Jersey Corporation were endorsed to you in blank by the holders of them, endorsed on the back

in the Power of Attorney, under your direction and under your dominion and control?' He answered 'I am not sure that they were endorsed.' He admitted that the purpose was to qualify the holders as directors under the New Jersey statute. The meeting of the directors to which the witness referred was the one at which the secretaries were changed. He said that there were other meetings, the minutes of which were left at 16th and Callowhill Streets, in the Minute Book. In answer to the question, 'The Bergdoll Motor Co. of New Jersey had another asset, didn't it, other than that the Pennsylvania Corporation is alleged to have taken over, didn't it hold the stock of the Bergdoll Machine Company at 31st and Dauphin Streets? He answered, 'It owned some of the assets that were finally turned over to the Bergdoll Machine Company.'

'Q. It owned that plant at 31st and Daupin and its contents'?

'A. Part of them.' Witness testified that the ownership to these assets passed from the New Jersey company to the witness, who in turn sold them to the Bergdoll Machine Company. This was done by check. The witness made loans to the Louis J. Bergdoll Motor Co. of New Jersey, aggregating $70,000, or more, which was credited to him on the books, and the Bergdoll Machine Co.'s stock and machinery was then sold to him for his debt. This was done by himself and others, probably Mr. Fanning and Mr. Webster. Witness directed Mr. Kurtz to transfer $70,000 of property from the New [fol. 190] Jersey corporation in return for the loan of $70,000. This transaction, the witness testified, was the Minute Book. The witness admitted that he signed an application for a charter of the Pennsylvania Company, but did not remember that there was $50,000 paid into the treasury of the company; did not remember that he was the owner of 2,998 shares of the Pennsylvania Company issued of the stock to the amount of $300,000, and got no property for it; made a report to the Internal Revenue Department of the Government in 1911, as to the business done by the corporation of New Jersey; had made none for 1912 of the Pennsylvania Corporation. This was because he was retired at the end of December. He paid nothing for the 2,998 shares and transferred them to Erwin R. Bergdoll for no consideration. He did not turn over the stock of the New Jersey company to Erwin R. Bergdoll, but only the stock of the Pennsylvania Corporation. Witness admitted that his counsel in the United States Court objected to the appointment of Mr. Fanning as Receiver. When the witness made the transfer of the stock certificates of the Pennsylvania Corporation, he read the stock certificates before he signed them. In answer to the question, 'It says here plainly, "incorporated under the laws of Pennsylvania," you knew that was on there when you signed it,' he answered, 'Yes, I believe I did.' In answer to his counsel, the witness explained that he wanted to domesticate the New Jersey Corporation, and make it a Pennsylvania Corporation; that the certificates of stock were issued with this object, but that nothing further was done to consummate it, and that the Pennsylvania Company did not acquire the assets from the New Jersey Company. The witness stated that

[fol. 191] he was six months in the house, and paid no visits during that time to the plant, and that Mr. Fanning had entire charge of the business during that time. The witness admitted that the New Jersey Corporation was insolvent at the present time. The witness was then examined by Mr. Harrigan as to a meeting at Harrigan's office on the Friday afternoon preceding the Monday which was the last date for filing an Answer, and was asked, 'the primary purpose was to control the selection of a Trustee, wasn't it?' He answered, 'No.'

'Q. Didn't you bring a candidate to me for the Trusteeship?'

'A. Not that day I don't believe.'

'Q. You mean to say that you did not bring Mr. Ambler?'

'I brought Mr. Ambler to your office at one time. I am not sure whether it was on that occasion or not.'

'Q. Why did you bring a candidate?'

'A. I brought Mr. Ambler just to get you acquainted with the gentleman. * * * You see on your part Mr. Fanning had been proposed.' Witness denied that the filing of an Answer depended upon the selection of a Trustee.

The Minute Book of the New Jersey Corporation, and the Minute Book of the stockholders of the Pennsylvania Corporation were then offered in evidence.

At the following meeting Louis J. Bergdoll testified that the authorized capital of the Pennsylvania Corporation was $500,000, and paid in capital $300,000. He testified that he held all the shares of the Pennsylvania Corporation except twenty, made up of three certificates, No. 1 for 18 shares, No. 2 for one share to Charles A. Bergdoll and No. 3, for one share to George H. B. Martin. The $300,000 was paid in in cash. On being handed an application for Letters Patent by the Governor of Pennsylvania, he testified to his [fol. 192] signature on the third page. He also identified for Mr. Weaver the signature of Frank J. Fanning. He testified that there was no impairment of the capital of the New Jersey Company down to the end of 1912, by taking any out. He replied, 'No, none whatever.' * * * 'The creditors of the Louis J. Bergdoll Motor Company as they exist today are creditors of the New Jersey Company, for the reason that the New Jersey Company got the benefit of the bank loan.' Mr. Weaver showed the witness the bank pass book in the Central Trust & Savings Co. of the Louis J. Bergdoll Motor Company, beginning November 8th, 1911, and continuing until March 22nd, 1913, and he testified that he knew of no change made in the bank account of the Central Trust & Savings Co. during that period. He was then shown a book giving an account of collections of drafts on cars, of the Central Trust & Savings Co. by the Louis J. Bergdoll Motor Company, and testified that there was no change made in that book to his knowledge during the period it ran. The $25,000 was borrowed in the middle of September. Under date of September 23rd, 1912, he deposited $21,625.00 which was declared by the witness, to be in his opinion placed to the credit of the New Jersey Company. The application for the charter of the Pennsylvania Com-

pany, the Letters Patent of the Pennsylvania Corporation, and the Minutes of the New Jersey Corporation, the stock certificate books of the New Jersey Company were then offered in evidence by Mr. Harrigan.

The next witness was Wade Kurtz, the bookkeeper who testified that he entered the employ of the Motor Company about September 15th, 1911; never saw any Minute Book, but saw the seal of the New Jersey corporation in the safe in 1911. In the forepart of 1912, in [fol. 193] consequence of the directions of Mr. Fanning, he handed the seal to him. Witness testified that Louis J. Bergdoll instructed him to do as Mr. Fanning said. When an application was made for a charter for the Pennsylvania Corporation, the witness made the necessary and proper bookkeeping entries to effect the transfer. He first heard of the application about the beginning of 1912, and made the entries under date of May 31st, 1912, under the direction of Mr. Fanning. Witness went down to see Mr. Mowitz frequently on legal matters, and talked over with him the method of transfer of the assets and liabilities of the New Jersey Corporation to the Pennsylvania Corporation. Mr. Mowitz instructed him to transfer the assets and liabilities of the New Jersey Corporation to the Pennsylvana Corporation, which he did. That the books in which he made the transfer were then produced, and witness turned to the capital stock of the Pennsylvania Company, and stated that there was a capital stock account of $300,000 under date of June 1st, 1912. The ledger of the Louis J. Bergdoll Motor Company was then offered in evidence, showing the liability outstanding and capital stock to the amount of $300,000 under date of June 1st, 1912. Witness swore that these were the original books as made at that time. The cash journal showed this record of transfer. Under date of May 31, 1912, a sale of the Louis J. Bergdoll Motor Co. of New Jersey to the Louis J. Bergdoll Motor Co. of Pennsylvania. Assets: Louis J. Bergdoll Motor Co. a Pennsylvania corporation is charged with $412,855.75 as follows: Cash $6,125.77; stock $186,464.47; machinery tools $3,312.26; equipments $7,628.23; accounts receivable $48,359.61; notes receivable $4,795.44; advertising $600.00; adjustment account (which was [fol. 194] said by the witness to be the deficiency account) $15,571.97. Liabilities; Accounts payable $52,746.75; notes payable $35,681.72; wages, $2,404.11; deposits $12,023.17; Louis J. Bergdoll loan account $10,000; capital stock $300,000, a total credit to Louis J. Bergdoll Motor Co. a Pennsylvania Corporation of $412,855.76.

Witness testified that the entry was made on May 31st, 1912, that the Pennsylvania charter hung upon the wall of Mr. Fanning's office in the plant at 16th and Callowhill Streets. Witness never saw the charter of the New Jersey Corporation. On being asked as to the transformation of the officers and directors, the witness said it was either January 15th or 16th, 1913, when Louis J. Bergdoll went out and Charles A. Bergdoll and Erwin R. Bergdoll came in. Mr. Erwin R. Bergdoll was President, Charles A. Bergdoll, Treasurer, and Robert McBurney, General Manager. Before this Robert McBurney was general manager of the Charles A. Bergdoll Coal Company. Mr. Charles A. Bergdoll was the treasurer of the Pennsylvania Company.

The witness prepared a report to the Commonwealth of Pennsylvania in the forepart of 1913 for the corporation tax due the government on behalf of the Pennsylvania Corporation. He did not see it signed or sworn to, but saw the signature on it. While the witness was in the employ of the New Jersey Corporation prior to the date of its charter, March 18th, 1912, reports were made by the New Jersey Corporation. The reports for 1911 were made in the forepart of 1912, but none were made for the year 1912 for the New Jersey Company, and no report was made to the government for the corporation tax for the New Jersey Company for the year 1912. Witness recalled the transfer of the Bergdoll Machine Co. to Louis J. Bergdoll. The [fol. 195] instructions came to him the forepart of March, 1912, to sell it. This was by note sent down in Mr. Bergdoll's own handwriting. The plant was sold to Mr. Bergdoll personally, and checks were exchanged, one for $70,000 and another for $12,000. Witness gave Mr. Bergdoll the Louis J. Bergdoll Motor Co.'s check for $70,000 and $12,000 and Mr. Bergdoll gave him his check for the same amounts, in favor of the Louis J. Bergdoll Motor Co. The machinery and tools and stock in plant No. 2 were transferred. The witness showed the entries in the book, cash entry, debiting cash $70,000 received from Louis J. Bergdoll in payment of machinery and tools and equipment, and lease of plant 2, and cash credited with $70,000 and charged against Louis J. Bergdoll's loan account. These entries he made on instructions received from Louis J. Bergdoll. As to the $25,000 note, the witness gave the Central Trust & Savings Co. a collateral note for the amount, signed by Louis J. Bergdoll as president, and gave the note to Mr. Fanning. The books showed that the obligations and liabilities of the New Jersey Company were assumed by the Pennsylvania Company. The Pennsylvania Company paid the debts and liabilities of the New Jersey Company after it got the $25,000 out of $49,066.33 worth of debts, consisting of rent, expenses and purchase of material. Out of this loan of $25,000 $3,375 went to the rent, and the balance went to pay the New Jersey Company's debts, and the debts contracted by the Pennsylvania Company after May 31st for the material. In aswer to the question why a change was not made in the bank account at the time of the change of title, he said, 'The best answer I can make to that is, that that was Mr. Bergdoll's way of doing business.'

[fol. 196] On cross-examination by Mr. Weaver the witness testified that he obeyed Mr. Fanning's orders until Mr. Fanning ceased to be general manager, about January 14th, 1913. The books from which he read the entries were the New Jersey book up to May 31st, 1912, and after that the Pennsylvania Company's book. The loose leaves containing the entries just read in answer to Mr. Harrigan, had only been taken out of the book once, when it was sent down to him a week before the meeting. They were brought down because the book was too heavy to carry. In answer to the question, 'Have you ever seen any other bookkeeping done like this,' he said 'I certainly have.' 'That is a combination cash journal, which is quite universally used.' The witness' attention was called to page 61 under date of May, 1912, assets, Louis J. Bergdoll Motor Co. a Pennsylvania Corporation $412,-

855.75, and the witness was asked, 'Where did you get the date to justify you in making this entry?' He answered, 'I closed the books under date of May 31st.' He testified that it shows in the books of the New Jersey Corporation in the deficiency account $412,855.76 of assets which were transferred. Louis J. Bergdoll was not in or about the factory or office within two months prior or four months after the entries were made in May, 1912, as far as the witness knew, but that the witness went up to see him when Mr. Fanning was away, but never talked to him of these entries. When the $25,000 was lent, the Central Trust Co. deducted $3,375 for taxes on the plant at 16th and Callowhill Streets, which was charged to the North Broad Street Realty Co., rent account, and Louis J. Bergdoll afterwards confirmed that entry by exchanging checks. Witness described the method of keeping the ledger and the system of controlling accounts. [fol. 197] Witness' attention was called to the Warner Gear Co.'s account, presenting an unbroken series of entries commencing July 10th, 1911, and ending March 15th, 1913, and to the Standard Roller Bearing Co.'s account, where the goods were purchased under a written contract. Witness knew nothing about the contract, but checked up orders under it. The majority of the contracts were at Louis J. Bergdoll's private house. The witness did not send notes to any of the people who supplied goods to the Motor Company that the New Jersey Company was no longer in existence. The bills were made out as before, and checks on the same bank account. The same bill heads were used. No stationery was changed, except that the contracts for agents, which Mr. Bergdoll had to have printed. Witness made the entries in the books. The witness identified Mr. Fanning's signature to a contract dated October 30th, 1912, of the New Jersey Company, with George C. Russell, of New Brunswick, N. J. Everything the witness did was according to Mr. Fanning's consent. He made a trial balance every month, to show that the books were in balance. These trial balances were possibly at the storage. In answer to Mr. Harrigan the witness testified that he received instructions what to do about the Bergdoll Machine Co. from Louis J. Bergdoll over the telephone, but that Louis J. Bergdoll afterwards sent written instructions down. The only open evidence as to the existence of a Pennsylvania Corporation was the Pennsylvania charter, hanging on the wall. It was there from the Spring of 1912. The certificate of registration of the New Jersey Corporation in Pennsylvania was never seen by the witness until two or three weeks before he testified, when it was discovered around the factory, as he never saw it. It was not hanging on the wall or visible anywhere.

[fol. 198] On examination by Mr. Harrigan the witness testified, in confirmation of previous testimony, that the reason why the dealers' contracts were on the New Jersey form was that the contract which Louis J. Bergdoll drew up contained a paragraph about a valveless motor, which was never made, and also about a deposit of $1,250, which could not be secured from the agent. Witness consulted Mr. Mowitz frequently, as attorney for the company, but did not follow his instructions with regard to changes in the individual accounts, because it would mean three ledgers to refer to. In every other re-

spect the witness followed Mr. Mowitz's advice. In answer to the question by Mr. McMullan the witness explained the combination trial balance entered in his journal on May 31st, 1912, and was asked, 'What did you do with the balance shown on the accounts payable as of May 31st, 1912, in the sheets taken from the ledger of the New Jersey Company,' and he answered, 'When I closed out the New Jersey Company books I opened up an account with the Louis J. Bergdoll Motor Co. a Pennsylvania corporation, as per that sheet. I charge- the Pennsylvania Corporation with all the assets and credited the assets on these individual accounts. Also credited the Pennsylvania Corporation with the liabilities, and the capital stock, and charged to individual liabilities and capital stock, thus closing out on the ledgers of the New Jersey Corporation every account.' On these accounts receivable the controlling account of May 31st, 1912, showed a debit balance of $48,359.61. The witness credited that account and charged $48,359.61. Then he came over with the Pennsylvania Corporation books, and opened up an account receivable with identically the same amount, $48,359.61. This system was [fol. 199] followed with the accounts payable. The witness then explained that the loose leaves were taken out of the cover and put in the transfer binder. The accounts receivable and accounts payable were carried twice in the ledger, which represented all the assets of the company. The contents of this ledger were the real entries, and these leaves were auxiliaries, and made up from the contents of the loose leaves. Sheets previous to May 31st were the New Jersey Corporation, and after that they were the Pennsylvania Corporation.

The witness testified that Louis J. Bergdoll and Fanning left the company January 4th, 1913, and their places were taken by Erwin R. Bergdoll, Charles A. Bergdoll and Robert McBurney. Within a few days these latter also went out and were succeeded by Mr. Hubert as President, and Mr. Taig as secretary and treasurer. Fanning stayed in a different capacity. Up to January 15th, 1913, Louis J. Bergdoll signed the checks, and after that he did not. The $50,000 in cash which Mr. Fanning swore appeared in the application for charter as going into the Pennsylvania Company, did not appear as an entry in any of the witness' books, nor did he know of any such sum being received. At a subsequent meeting, Mr. Harrigan offered in evidence the contract annexed to the Proof of Claim of the United States Heat & Lighting Co. being an agreement made October 10th, 1912, between the Louis J. Bergdoll Motor Company, of Pennsylvania, signed by Fanning as vice-president of the Motor Company, and for the seller, M. A. Robertson, with the seal attached of the Pennsylvania Company. On Louis J. Bergdoll being recalled he testified that the paper produced before him was in his handwriting. The paper bore no date, but was signed by Louis J. [fol. 200] Bergdoll, addressed to Mr. Sharp, and containing instructions to Mr. Kurtz, who was the bookkeeper. The witness stated that he did not attach the seal to the contract of the Louis J. Bergdoll Motor Co. with the United States Heat and Lighting Co.

Mr. Harrigan then took the stand, and testified that he was the Receiver of the bankrupt company, and as such receiver made a de-

mand on Charles A. Bergdoll to produce the Minute Book and the seal of the Pennsylvania Corporation, and received from Robert McBurney the Minute Book of the corporation signed by the Bergdolls in their own handwriting. The witness had had possession of this book for a month or six weeks, but had mislaid it, and came across it by accident on the previous Monday. The minutes were of the Pennsylvania Corporation, and showed that directors' meetings were held. The minutes were then offered in evidence, together with the certificate from the Secretary of the State of New Jersey, that the Louis J. Bergdoll Motor Co. had not filed its annual report of officers and directors for the year 1912 as required by law. A copy of the loans of the Louis J. Bergdoll Motor Company was made to the Auditor General of the State of Pennsylvania for the year 1912. February 26th, 1912, was also offered in evidence, and a certificate of the Assistant Secretary of the treasury dated June 9th, 1913, with a certified copy of the annual net income of the Louis J. Bergdoll Motor Company for the year 1912, filed February 27, 1913, was also offered in evidence. He also offered in evidence a certified copy of the report of the capital stock for the year 1912, made by the Louis J. Bergdoll Motor Company of Pennsylvania, to the Auditor General of the State of Pennsylvania, filed March 18th, 1913.

Mr. Kurtz was then recalled. He testified under objection that the [fol. 201] total number of creditors of the Louis J. Bergdoll Motor Co. prior to the transfer on May 31st, 1912, was twenty-nine, and the amounts of their claims $42,631.56, and that these claims were still outstanding. The total amount of claims which had been created since May 31st, 1912, were $133,800.05 represented by one hundred and seventy eight creditors. Of these eighty-six were creditors which dealt with the company subsequent to May 31st, but not prior thereto. Memorandum of claims was then produced and offered in evidence, as containing the data from which the witness had testified. The witness was then cross-examined to show if any of the claims arose under a continuing contract with the New Jersey Company.

Mr. William F. Loring was then examined, and testified that he entered the employ of the New Jersey Corporation in November, 1910, to assist the purchasing agent; that all contracts were signed at that time by the New Jersey Corporation. The witness helped at the purchasing end from January, 1911, until August, 1912, and on May 31st, 1912, was assisting in the purchasing department, and was held responsible for having a sufficient supply of all required materials on hand. If a shortage took place he had to order the material and get it in. He was familiar with the amount of material on hand May 31st, 1912, and made a memorandum during the latter part of April, 1913. From the examination then made he was able to determine approximately what material he had on hand on May 31st, 1912. These materials he examined in detail. The inventory then made was identified by him and described in detail. On cross-examination the witness stated that the paper was made up by Mr. Kurtz, and him together. Mr. Kurtz did the typewriting, but he [fol. 202] compared the figures with those on a memorandum in his own handwriting. The memorandum was entirely of stock; no ma-

chinery, fixtures or furniture. The memorandum was made up from actual count in the place at 16th and Callowhill. Goods which came in after May 31st, 1912, under contracts executed before that time, were not included in the witness' statement. The actual proportion of the materials on hand as of May 31st, 1912, were in the proportion of 40% to the total value of materials at the Receiver's sale. On being asked by Mr. Weaver, 'Did the 60% come after May 31st, 1912, or prior to May 31st, 1912,' he said, 'To the best of my knowledge there was no contracts existed that were not closed at that time.' The Warner Gear Co. was shown as an exception. Where the prices were fixed by oral contract the contract was yearly renewed, and he was told of it by Mr. Fanning. Fanning told him there was a yearly contract with the Standard Roller Bearing Co. Witness explained to the Referee that prices varied from year to year, and that one set of specifications to cover the next year's requirements were sent. 'There was a contract issued for every month in 1911, and there was one price. Our specifications for 1912 changed that price.'

Counsel then proceeded to argument.

The Referee finds the facts as follows:

Up to a certain point these facts are undisputed. The New Jersey Corporation was incorporated February 1st, 1910, with an authorized capital of $500,000, divided into 5,000 shares of the par value of $100 each, for the purpose of manufacturing, buying and selling motor and motor vehicles with all subsidiary powers. Twenty shares were subscribed for and issued on that date as follows: To Louis J. [fol. 203] Bergdoll 18 shares, F. R. Hansell, one share, and John A. MacPeak, one share. Louis J. Bergdoll made further contributions to the capital from time to time, and the total of amount subscribed by him was approximately $300,000. By-laws were then adopted by the Board of Directors under the power conferred under the charter.

At the first meeting of the incorporators on March 4th, 1910, there were present Frank R. Hansell, holding the proxy of Louis J. Bergdoll for 18 shares; F. R. Hansell and John A. MacPeak, for one share each. Transfers of subscriptions for one share each were presented from F. R. Hansell to Charles A. Bergdoll, and from John A. MacPeak, to George H. B. Martin, which upon motion were accepted by the company. Louis J. Bergdoll, Charles A. Bergdoll and George H. B. Martin were then elected directors for the following year. The directors were authorized to issue capital stock to the amount of $500,000. At the stockholders' meeting held on the same date, Louis J. Bergdoll, Charles A. Bergdoll and George H. B. Martin were elected directors, and received 18 votes each. They then proceeded to elect Louis J. Bergdoll president, Philip Malickson Secretary and Charles A. Bergdoll treasurer. The corporation made its annual report to the State of New Jersey for 1911.

The next annual meeting of the stockholders was appointed to be held on Thursday, January 4th, 1911.

There are no other minutes of the New Jersey Corporation.

The business of the New Jersey Corporation was conducted at 31st and Dauphin Streets, where the machine work was done, and at 16th and Callowhill Streets, the main office, where the cars were assembled [fol. 204] and finished. Neither the charter of the New Jersey Corporation nor the certificate of its registration in Pennsylvania was displayed in the office of the company. The whereabouts of the seal of the New Jersey Corporation was not ascertained, and it appears only to have been used to seal the three certificates of stock originally issued to Louis J. Bergdoll, Charles A. Bergdoll and George H. B. Martin. The seal was kept at 16th and Callowhill Streets, but in the Spring of 1912 it was sent to the home of Louis J. Bergdoll. The annual report required by the statutes of New Jersey to be filed, was not filed for the year 1912, nor was there any report made to the department of Internal Revenue for the year 1912, according to the Act of Congress. In January, 1912, the machine plant at 31st and Dauphin Streets was sold to Louis J. Bergdoll for his own loan of about $85,000, and later was sold by him to the Bergdoll Machine Co., then newly incorporated. There is no record of a meeting of the stockholders and directors to authorize this sale. There were no meetings of the stockholders or directors according to the Minute Book of New Jersey except those held for organization March 4th, 1910.

The Louis J. Bergdoll Motor Co. of Pennsylvania was incorporated on the 15th of March, 1912, under circumstances which are differently narrated by the witness for the Trustee on one side, and by Louis J. Bergdoll on the other. Before proceeding to discuss the matter in controversy, the Referee will recite the records of the Pennsylvania Company.

It is named the Louis J. Bergdoll Motor Company, and was formed for the purpose of buying and selling motors and motor vehicles with all the subsidiary powers. The subscribers are given as Louis J. Bergdoll 2,998 shares, E. Lawrence Webster, 1 share, and Frank [fol. 205] J. Fanning, 1 share. The directors for the first year are given as Louis J. Bergdoll, E. Lawrence Webster and Frank J. Fanning. The amount of the capital stock was $500,000 divided into 5,000 shares of $100 each, and it was certified that $6,000 had been paid in in cash to the treasurer. To this certificate was appended the names of Louis J. Bergdoll, E. Lawrence Webster and Frank J. Fanning. The charter was in the usual form.

The first meeting of the incorporators was held April 24th, 1912, and Louis J. Bergdoll, Frank J. Fanning and E. Lawrence Webster were present. The certificate of Incorporation and Letters Patent were accepted, and Louis J. Bergdoll, E. Lawrence Webster and Frank J. Fanning were named as directors for the first year. The directors were authorized to issue capital stock to the amount of $500,000 and to accept in full or part payment such stock, cash or such other property as the Board may determine as should be necessary for the business of the company. The form of stock certificates and seal of the corporation were also adopted.

On the same day there was held a first meeting of the Board of Directors, and Louis J. Bergdoll, was elected President, E. L. Web-

ster Secretary and Treasurer. The stock of the Pennsylvania corporation was issued as follows:

April 1st, 1912, certificate No. 1 for 2,998 shares to Louis J. Bergdoll.

Certificate No. 2 for one share to E. L. Webster.

Certificate No. 3 for one share to Frank J. Fanning.

On January 8th, 1913, certificate No. 4 was issued for 2,998 shares to Erwin R. Bergdoll in place of certificate No. 1 assigned by Louis J. Bergdoll. Certificate No. 5 for one share to Charles A. Bergdoll in [fol. 206] place of certificate No. 3 for one share, assigned by Frank J. Fanning, and Certificate No. 6 for one share to Grover C. A. Bergdoll, in place of certificate No. 2 assigned by E. L. Webster.

All of these certificates were signed by Louis J. Bergdoll and bear the seal of the Pennsylvania Corporation.

The first annual meeting of the stockholders was held on January 16th, 1913, at the office of the company. The three stockholders were present, and were elected directors for the following year. The secretary reported the transfers of stock, which had been made since the previous meeting had been held. A meeting of the Board of Directors was held on the same day, and Erwin R. Bergdoll was elected president, Charles A. Bergdoll treasurer, and George H. B. Martin secretary. The secretary was instructed to report the change of officers of the company to the Auditor General of the Commonwealth of Pennsylvania as required by law. Erwin R. Bergdoll was authorized to sign all checks and notes.

On February 26th, 1913, the Pennsylvania Company filed its Report of Loans for the year 1912 with the Auditor General, the Report being signed and sworn to by Charles A. Bergdoll, treasurer. The Report certifies that the company was organized March 18th, 1912, and its indebtedness amounted to $12,500, evidenced by a collateral note for that amount, issued September 23, 1912, payable on demand to the Central Trust & Savings Co. of Philadelphia. On February 27th, 1913, the Pennsylvania Company made its return for annual income to the Collector of Internal Revenue for the year ending December, 1912, stating the total amount of bonded and other indebtedness outstanding at the close of the year at $58,905.66, showing the amount of interest paid thereon during the year on the [fol. 207] $25,000. This is signed by Erwin R. Bergdoll, president, and Charles A. Bergdoll, treasurer, and subscribed before E. Lawrence Webster, a Notary Public.

On the 5th of March, 1913, certificate No. 7 was taken for 2 shares to Erwin R. Bergdoll in place of certificates 5 and 6, assigned by Charles A. Bergdoll and Grover C. Bergdoll. On March 6th, 1913, certificate No. 8 for 2,997 shares to Emma C. Bergdoll, being part of certificate No. 4 assigned by Erwin R. Bergdoll; certificate No. 9 for 1 share to Joseph M. Hubert, being balance of certificate No. 4 assigned by Erwin R. Bergdoll; certificate No. 10 for one share to E. J. Taig, being part of certificate No. 7, assigned by Erwin R. Bergdoll, and certificate No. 11 for 1 share to William Ruhland, being balance of certificate No. 7, also assigned by Erwin R. Bergdoll. All of these certificates were signed by Erwin R. Bergdoll as presi-

dent, and countersigned by Charles A. Bergdoll, treasurer, with the seal of the Pennsylvania Corporation affixed.

The stockholders, therefore, at this time were Emma C. Bergdoll for 2,997 shares, Joseph M. Hubert for 1 share, E. J. Taig for 1 share, and William Ruhland for 1 share.

On March 13th, 1913, the Pennsylvania Corporation made a Report to the Auditor General of its capital stock for 1912, signed by Erwin R. Bergdoll, president, Charles A. Bergdoll, treasurer, showing the date of organization of the company as heretofore set forth, its receipts and expenditures, the bills payable amounting to $172,809.17. Its other indebtedness amounted to $25,000 on which $416.67 interest had been paid.

Charles A. Bergdoll, Erwin R. Bergdoll and Grover C. A. Bergdoll, [fol. 208] the directors of the Louis J. Bergdoll Motor Co., on the 5th of March, 1913, designated the following day, the 7th of March, for the meeting of the Board of Directors, and on that day the entire board being present, Grover C. A. Bergdoll resigned, and William Ruhland was elected director. Erwin R. Bergdoll resigned as director and president, and Joseph M. Hubert was elected to fill the vacancy. He then took his seat in the chair. Charles A. Bergdoll resigned as a member of the board, and also as treasurer, and his resignation was accepted and Edward J. Taig was elected as a member of the Board, and on being present took his seat. Grover C. A. Bergdoll then tendered his resignation as Secretary of this meeting, and the resignation was accepted and Edward J. Taig was elected secretary and treasurer of the company to fill the vacancies. It was then resolved that the Central Trust Co. the then depository of the company should be notified of the election of Mr. Hubert and that all checks and notes made thereafter should be signed by him.

The cash journal of the Louis J. Bergdoll Motor Co. under date of May 31st, 1912, shows the sale of the Louis J. Bergdoll Motor Co. of New Jersey to the Louis J. Bergdoll Motor Co. of Pennsylvania, as already recited by the Referee. The Louis J. Bergdoll Motor Co. of Pennsylvania is charged with $412,855.75, made up of the various assets taken over from the New Jersey Company, and its liabilities are stated, its accounts and notes payable, wages, deposits, loans and finally capital stock $300,000, a total credit to the Pennsylvania Corporation of the said $412,855.75. This entry was made by the bookkeeper of the company under the direction of Mr. Fanning.

[fol. 209] These and all other entries in the various books of the companies indicate the sale in a regular and ordinary way of the assets of the one corporation to the other corporation.

It is, however, alleged by Louis J. Bergdoll that this transfer was made without the authority of the stockholders, or directors of the New Jersey Company, and was therefore void. The Referee proceeds to consider this allegation.

The account given by Fanning of the circumstances under which the sale of the assets of the New Jersey Corporation took place has been recited, and is briefly recapitulated. The witness testified that Mr. Bergdoll nominally owned all the stock of the New Jersey Com-

pany, except two shares, and in reality owned those two shares also; that he acted entirely as he pleased, changing the officers of the company as he desired, and that every matter of moment was submitted to him at his house. The witness stated the circumstances of the incorporation of the Pennsylvania Company as set forth on page 6 of this report.

This evidence remained unshaken by cross-examination.

Louis J. Bergdoll, on being called to the stand by his counsel gave testimony which has been carefully summarized by the Referee. He denied that the New Jersey Corporation authorized the transfer to the Pennsylvania corporation, but when asked whether it did in fact so transfer its assets, he said, 'I don't know.' He testified that for two or three months he was constantly at the office of the company with Mr. Fanning, until he fell ill in September, 1911, and after that the entire management was left with Mr. Fanning. He denied that he instructed Fanning to sign monthly reports, but said [fol. 210] that he was asked to verify the truthfulness of them by signing them. As regards the opening of the new set of books by Kurtz, he denied that he instructed him to have them opened. His answers are set forth on page 13 of this Report. To the positive and detailed assertions of the witnesses for the Trustee, he replied 'Not to my knowledge. I don't know anything about it.' When confronted with the seal of the Pennsylvania Company with his signature thereon, he was asked 'Will you say that you did not attach the seal?' He replied, 'I wouldn't say that I did not. I don't recollect it.'

'Q. Did you see it attached?'

'I wouldn't swear that I did.'

Occasionally when confronted with his signature he admitted that he knew of the incorporation of the Pennsylvania Company. He read the stock certificates of the Pennsylvania Corporation, and in answer to the question, 'It says here plainly "incorporated under the laws of Pennsylvania," you knew that was on there before you signed it?' He answered, 'Yes, I believe I did.' In regard to the note of the Central Trust Co. he said he had no knowledge of putting the seal on the note ,but wouldn't swear that he didn't put it on. A moment afterwards he swore that he never used it. Witness' demeanor upon the stand was hesitating and unconvincing. Confronting him with the positive and vigorous testimony of Fanning and Kurtz, the Referee has no difficulty in finding that he authorized the sale of the assets of the New Jersey Corporation, used the seal of the Pennsylvania Company, was aware of every step that was taken by the Pennsylvania Corporation up to the time of the bankruptcy, and entirely assented thereto.

For the irregularities which have been dwelt upon in the continuing conduct of the business, the petitioner is entirely responsible. [fol. 211] That Fanning occupied the position of vice-president and General Manager without change from January 1st, 1912, to December 26th, 1912; that reports were made out without change from January, 1912, to the discontinuance of the business; that contracts with

agents were made in the name of the New Jersey Corporation up to the time the business was discontinued, and with the Warner Gear Co. in February, 1913; that the policy of insurance with the Fidelity & Casualty Co. was not assigned to the Pennsylvania Company; that the direction to transfer the assets was given two months after the organization of the company; that the accounts receivable and payable were continued in books dated from the opening of the New Jersey Corporation in 1910 until the bankruptcy of 1913; that bills were made out in the same way before and after the transfer; that the stationery was not changed; that merchandise was received under the old contracts; that notice of the transfer was not sent to creditors; that the bank account was not changed from the old to the new company; all this has been brought out in detail in support of the petition. For some of them, viz., the continuing of the accounts in the loose leaf books, and the use of the New Jersey contracts because of the mistake made in printing the Pennsylvania contract, an adequate explanation has been given.

The Referee finds that the other circumstances were known to Louis J. Bergdoll and that all transactions took place with his assent and approval.

The ground, however, which was most strongly taken before the Referee by the able Counsel for the petitioner, was that the sale of the New Jersey Corporation to the Pennsylvania Corporation could be made only by a resolution of the stockholders, followed up by [fol. 212] the proper action of the Board of Directors, and that any attempt to transfer the assets of the one corporation to the other in any other method than that provided by law was null and void.

If this were a case between the majority and minority stockholders of the corporation, this contention might have great force; but it has been sufficiently shown that the Louis J. Bergdoll Motor Co. of New Jersey was in effect the property of Louis J. Bergdoll who held control of the entire stock, elected or appointed officers at his leisure, and finally when the corporation became hopelessly in debt, himself directed the incorporation of the Pennsylvania Company, and the transfer to it of the assets of the New Jersey Corporation. In other words, Louis J. Bergdoll, the owner of all the stock of the New Jersey Corporation, at a certain date transferred the assets of that corporation to Louis J. Bergdoll, the owner of all the stock of the Pennsylvania Corporation, in order to evade the payment of the debts of the New Jersey Company. Since that time the Pennsylvania Company also has become indebted in large amounts, the total indebtedness being forty per cent in the liabilities taken over from the New Jersey Corporation, and sixty per cent incurred since.

Mr. Bergdoll is now seeking to withdraw from the creditors of the Pennsylvania Corporation the main assets of the company. It is not necessary to say that he cannot use the forms of law to effect such a purpose. Whatever a minority stockholder of the New Jersey Corporation who had paid value for his stock might set up, the petitioner is plainly estopped from making any such defense against the creditors of the Pennsylvania Company.

The Referee finds that the assets now in the hands of the Receiver [fol. 213] are the property of the bankrupt, the Louis J. Bergdoll Motor Company, of Pennsylvania.

The Referee recommends to your Honors a decree to that effect.

The Referee annexes hereto the Petition and Order of Court thereon; the testimony taken hereunder; the Bankrupt's report of Loans; the Bankrupt's Return of Annual Net Income to the Internal Revenue Department; and the Bankrupt's Report of Capital Stock for 1912. The Referee sends herewith the Minute Book of the Louis J. Bergdoll Motor Co. of Pennsylvania; the Minute Book of the Louis J. Bergdoll Motor Co. of New Jersey; the Minute Book of the stockholders of the Louis J. Bergdoll Motor Co. of Pennsylvania.

All of which is respectfully submitted.

Richard S. Hunter, Referee.

To the Honorable the Judges of the District Court.

July 23rd, 1913."

[fol. 214] "In the District Court of the United States, Eastern District of Pennsylvania

In Bankruptcy. No. 4742

In the Matter of the Louis J. Bergdoll Motor Company, a Pennsylvania Corporation

To the Honorable the Judges of the said Court:

The petition of The Louis J. Bergdoll Motor Company, a corporation organized under the laws of the State of New Jersey, respectfully represents:

1. That it has been doing business in the State of Pennsylvania since its organization, in February, 1910, and is duly authorized, by registration, to do business in the State of Pennsylvania.

2. That a petition in bankruptcy was filed in your Honorable Court on the 12th day of March, 1913, against the Louis J. Bergdoll Motor Company, a Pennsylvania corporation; and Frank A. Harrigan, Esq., was appointed Receiver of said corporation, and the said Frank A. Harrigan, as Receiver aforesaid, took possession by virtue of said appointment of the personal property of your peti- [fol. 215] tioner on the premises at southwest corner of 16th and Callowhill Streets, occupied by your petitioner, and the goods and chattels of your petitioner are now advertised to be sold by said Receiver, by virtue of an order of your Honorable Court, on May 14th, and 15th, as the property of the said Pennsylvania corporation.

3. Your petitioner avers that the said property so advertised to be sold by the said Frank A. Harrigan, Receiver, as aforesaid, is

not the property of the said Pennsylvania corporation, but is the property of your petitioner.

Your petitioner therefore prays that the matter of the title to the said goods and chattels now in the possession of said Frank A. Harrigan, Receiver, as aforesaid, be referred to Richard S. Hunter, the Referee in above case, in order that testimony may be taken, and an opportunity given to your petitioner to prove the facts above set forth, and that said goods and chattels be delivered to your petitioner upon proving title thereto, and that said sale be postponed, pending said reference.

And your petitioner will ever pray, etc.

Louis J. Bergdoll Motor Co. of New Jersey, by Louis J. Bergdoll, President."

[fol. 216] "STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Louis J. Bergdoll, being duly sworn, according to law, deposes and says that he is President of the Louis J. Bergdoll Motor Company, a corporation of the State of New Jersey, and the petitioner above named; that the facts set forth in the foregoing petition are just and true to the best of his knowledge and belief.

(Sgd.) Louis J. Bergdoll.

Sworn to and subscribed before me this 7th day of May, A. D. 1913. Frank J. McMahon, Notary Public. My commission expires 2-21-1915. (Seal.)

Order

And now, May 9th, 1913, on consideration of above petition and upon motion of John Weaver, the above petition for reclamation is referred to Richard S. Hunter, Referee, to take testimony as to the title of the property in Receiver's hands, the sale not to be postponed however.

J. W. Thompson, J."

[fol. 217] "UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify, that the annexed and foregoing is a true and faithful copy of the original petition of Louis J. Bergdoll Motor Company as to title, etc., and Order of the Court thereon entered and filed on the ninth day of May, A. D. 1913, in the matter of Louis J. Bergdoll Motor Company, Bankrupt, in bankruptcy, cause No. 4742, and now remaining among the records of the said Court.

Witness my hand and the seal of the said Court this ninth day of May, A. D. 1913.

William W. Craig, Clerk District Court U. S., by T. L. Cobaugh, Deputy Clerk. (Seal.)"

[fol. 218] IN COURT OF COMMON PLEAS

EXHIBIT IN EVIDENCE

To the Governor of the Commonwealth of Pennsylvania.

Sir: In compliance with the requirements of an Act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An Act to provide for the incorporation and regulation of certain corporations," approved the 29th day of April, A. D. 1874, and the several supplements thereto, the undersigned, all of whom are citizens of Pennsylvania, having associated themselves together for the purpose hereinafter specified, and desiring that they may be incorporated, and that letters patent may issue to them and their successors according to law, do hereby certify:

1st. The name of the proposed corporation is Louis J. Bergdoll Motor Company.

2nd. Said corporation is formed for the purpose of manufacturing, buying, selling, trading and dealing in and with motors and motor vehicles of all kinds, and any appliances, accessories, contrivances or parts pertaining thereto.

3rd. The business of said corporation is to be transacted in Philadelphia, Pa.

4th. Said corporation is to exist perpetually.

5th. The names and residences of the subscribers and the number of shares subscribed by each, are as follows:

Name	Residence	No. of —
Louis J. Bergdoll	2205 Green St. Philadelphia, Pa.	2,998
E. L. Webster.....	1400 Vine St. "	1
Frank J. Fanning....	4526 Chestnut St. "	1

6th. The number of directors of said corporation is fixed at Three [fol. 219] and the names and residences of the directors who are chosen directors for the first year are as follows:

Name	Residence
Louis J. Bergdoll	2205 Green St. Phila. Pa.
E. Lawrence Webster	1400 Vine St. "
Frank J. Fanning	4526 Chestnut St. "

7th. The amount of the capital stock of said corporation is $500,000 divided into 5,000 shares of the par value of $100 00/100, and $50,000 00/100, being ten per centum of the capital stock, has been paid in cash to the Treasurer of said corporation, whose name and residence are: E. Lawrence Webster, 1409 Vine St. Philadelphia, Pa.

(Sgd.) Louis J. Bergdoll. (Seal.) —— ——. (Seal.) (Sgd.) E. Lawrence Webster. (Seal.) (Sgd.) Frank J. Fanning. (Seal.) —— ——. (Seal.)

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Before me, a notary public in and for the county aforesaid, personally came the above-named Louis J. Bergdoll, E. Lawrence Webster and Frank J. Fanning, who in due form of law acknowledged the foregoing instrument to be their act and deed for the purposes therein specified.

Witness my hand and Seal of office, the 15th day of March, A. D. 1912.

(Sgd.) Joseph F. Cotter, Notary Public. Commission expires May 14, 1915. (Notarial Seal.)

[fol. 220] STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Personally appeared before me, this 15th day of March, A. D. 1912, Louis J. Bergdoll, E. Lawrence Webster and Frank J. Fanning, who being duly sworn, according to law, depose and say that the statements contained in the foregoing instrument are true.

(Sgd.) E. Lawrence Webster. (Sgd.) Frank J. Fanning.

Sworn and subscribed before me the day and year aforesaid. (Sgd.) Joseph F. Cotter, Notary Public. Commission expires May 14, 1915. (Notarial Seal.)

Endorsements

Application of Louis J. Bergdoll Motor Co.

Executive Chamber,
Harrisburg, Mar. 18, 1912. 191-.

To the Secretary of the Commonwealth.

Having examined the within application and found it to be in proper form, and within the purposes of the class of corporations specified in section two of the act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved April 29th, A. D. 1874, and the several supplements thereto, I hereby approve the same, and direct that letters patent issue according to law.

(Sgd.) John K. Tener, Governor.

[fol. 221] PENNSYLVANIA, ss:

Secretary's Office

Enrolled in Charter Book No. 127, Page 18175.

Witness my hand and Seal of office, at Harrisburg, this 18th day of March, A. D. 1912.

(Sgd.) Wm. Hertzler, Deputy Secretary of the Commonwealth. (Seal of the Secretary of the Commonwealth.)

3. Mch. 25/12. 200. Typewritten list of signatures.

Recorded in the Office for Recording of Deeds in and for the City and County of Philadelphia, in Charter Book No. 44, Page 574.

Witness my hand and seal of Office this 25th day of March, A. D. 1912.

(Sgd.) W. K. Freeman, Deputy Recorder of Deeds. (Seal.)

Note

The Letters Patent fee on this application will be $30.00.

The bonus will be one-third of one per cent of the Authorized Capital Stock.

A typewritten list of all signatures must be placed in blank space above.

[fol. 222] EXHIBIT "C," 11/15/1917

(Minutes Pennsylvania Co.)

(Page 9—Letters Patent)

In the Name and by the Authority of the Commonwealth of Pennsylvania, Executive Department

To all to whom these presents shall come, Greeting:

Whereas, In and by an act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An Act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, Anno Domini one thousand eight hundred and seventy-four and the supplements thereto, the Governor of this Commonwealth is authorized and required to issue Letters Patent to all corporations formed under the provisions of said acts, embraced within the second class named therein.

And whereas, The stipulations and conditions in said act of the General Assembly and the supplements thereto, have been fully complied with by Louis J. Bergdoll Motor Company.

Therefore, Know Ye, That under authority of the Constitution and Laws of said Commonwealth in such case made and provided I Do By These Presents, which I have caused to be made Patent and Sealed with the Great Seal of the State, create, erect and incorporate the subscribers to the stock of said corporation, their associates and successors, and also those who may thereafter become subscribers or holders of the stock of the said corporation, into a body *of* politic and corporate in deed and in law by the name chosen and herein-before specified, who shall have succession perpetually and shall be invested with, and have and enjoy all the powers, privileges and fran- [fol. 223] chises incident to a corporation and be subject to all the duties, requirements and restrictions specified and enjoined in and by the said acts of the General Assembly and all other laws of this Commonwealth.

Given under my Hand and the Great Seal of the State, at the City of Harrisburg, this eighteenth day of March in the year of our Lord one thousand nine hundred and twelve and of the Commonwealth the one hundred and thirty-sixth.

John K. Tener.

By the Governor: Robert McAfee, Secretary of the Commonwealth.

IN COURT OF COMMON PLEAS

MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO

And now, to wit: February 16th, 1923, counsel for the defendant, having upon the trial of the said cause presented to the Court a point requesting binding instructions in favor of the defendant, which point was refused by the Court; now comes and moves the Court to have all the evidence taken upon the trial, certified and filed so as to become a part of the record and have judgment in favor of the defendant non obstante veredicto upon the whole, record.

Harry C. Kohlhas, Jr., Walter B. Gibbons, Attorneys for Defendant.

[fol. 224] IN COURT OF COMMON PLEAS

OPINION

AUDENRIED, P. J.:

As trustee of the bankrupt estate of the Louis J. Bergdoll Motor Company, Frank A. Harrigan has brought this action against Louis J. Bergdoll, now known as Louis J. Bergson, for the recovery of $155,571.97 with interest. The sum claimed is the amount of an assessment levied on the subscribers to the stock of that corporation by the Referee in the bankruptcy proceedings in order to raise the money required to defray the costs and expenses in those proceedings and pay its debts. That was based on the difference between the amount actually paid in on their stock subscriptions and the par value of the shares of stock issued to them.

The defenses set up by Mr. Bergson are:

1st. That his subscription to stock in the Louis J. Bergdoll Motor Company was paid in full by the transfer to it of tangible assets worth, at least, $144,428.03 and the cancellation of a claim for $300,000, the payment of which that corporation had assumed.

2nd. That none of the creditors of the bankrupt corporation gave it credit upon the faith of the statement that its stock was fully paid.

3rd. That the stock originally issued to or for him was transferred to others while the corporation was still solvent.

[fol. 225] 4th. That the claim is barred by the statute of limitations.

At the trial the following facts appeared either by the admissions of the defendant or by record evidence which was properly admitted as conclusive against him:

The Louis J. Bergdoll Motor Company was incorporated by letters patent issued by the Governor of Pennsylvania under date of 18 March, 1912, the application therefor with its endorsements being recorded at Philadelphia 25 March, 1912. Its authorized capital was fixed at $50,000, divided into 5,000 shares of the par value of $100.00 per share. Of its capital stock 3,000 shares were subscribed for, 2,998 by the defendant and one share each by two other parties, each of whom subscribed for and held the stock issued to him solely on behalf of the defendant. Although the charter application (which was signed and acknowledged by the defendant) declares that $50,000, being ten per centum of the capital stock had been paid in cash to the treasurer of the corporation, no such payment was ever made.

Upon the formation of this corporation there were transferred to it all the assets of a New Jersey Corporation of the same name, of which Mr. Bergson was, in effect, the sole stockholder; and without further payment stock certificates marked "full paid and non-assessable" were issued to him and his nominees for the number of shares subscribed for by them respectively. No resolution was adopted by the directors of the Louis J. Bergdoll Motor Company fixing a valuation upon the property transferred by the New Jersey Corporation or authorizing the acceptance thereof in payment of the subscriptions to [fol. 226] its capital stock. No proper evidence was produced by the defendant at the trial to show the real value of the assets received by the Pennsylvania Corporation from the source just mentioned. It appeared, however, that it was adjudged by the Referee in the bankruptcy proceedings against it (after a hearing at which Mr. Bergson appeared as a claimant and testified) that they were worth only $144,428.03. They, therefore, fell short by the sum of $155,571.97 of paying for the stock subscribed by the defendant.

On 18 January, 1913, the shares of stock owned or controlled by the defendant were transferred to his brothers.

On 11 April, 1913, on petition of certain of its creditors the Pennsylvania Corporation known as Louis J. Bergdoll Motor Company was by the District Court of the United States for the Eastern District of Pennsylvania adjudged a bankrupt.

By the schedules filed with the Referee by the president of the company its debts were stated to amount to $176,431.61, and the amount of its assets was given as $188,674.48. The valuation placed on its assets by the inventory and appraisement filed May 15, 1913, was, however, only $36,621.49; and on May 19, 1913, the Court confirmed their sale for the price of $45,062.85. The Louis J. Bergdoll Motor Company was undoubtedly insolvent on 11 April, 1913, and that fact became obvious to its creditors on 19 May, 1913, on

which date, however, its financial condition was not materially worse than it had been as far back as December, 1912.

From the date of the adjudication of bankruptcy until the latter part of the year 1917, the estate of the bankrupt was involved in extensive litigation.

On 22 October, 1917, Mr. Harrigan, as trustee of the bankrupt [fol. 227] estate of the company, filed a petition in the Bankruptcy Court praying that an assessment be made on the stock that had been issued by it, and that he be authorized to proceed for the collection of the amount of the assessment. On 14 February, 1918, the Referee, to whom this petition was referred for consideration, entered an order making an assessment of 51.85 per cent of their par value on the company's outstanding shares. On 1 July, 1919, this order was confirmed by the United States District Court. In March, 1920, the decree of the latter court was affirmed by the Circuit Court of Appeals, so far as it adjudicated the necessity of an assessment, the rate thereof and the parties who were prima facie subject to the assessment, but reversed so far as it assumed to determine the personal liability of Mr. Bergson.

An action to recover from the latter the amount of the assessment on his stock was instituted by the plaintiff herein in the United States District Court for the Eastern District of Pennsylvania, but was discontinued. On 13 July, 1921, the present action was begun.

Upon these facts the trial Judge directed the jury to find for the plaintiff for the amount of its claim with interest; and a verdict was accordingly rendered against the defendant for the sum of $192,909.24

The defendant now asks for a new trial, or, alternately, judgment non obstante veredicto.

In view of the conclusion that we have reached upon the latter motion no discussion of the reasons advanced in support of the former is necessary.

It is presumed that a corporation obtains credit on the basis of the amount of stock that it has issued, that is to say, upon the assumption by those who trust it that the money subscribed for its [fol. 228] shares has actually been paid in, or is still due from its stockholders. It was, therefore, unnecessary for the plaintiff to produce evidence to show that in this case the company's creditors had in reality acted upon that inducement: Fletcher's Cyclopaedia of the Law of Private Corporations, S. 4095, and cases there cited.

Although a subscriber to stock which is "watered," or fictitiously paid up, may be under no obligation to pay anything thereon to the corporation itself, the amount that actually remains unpaid on his subscription is deemed, so far as creditors are concerned, to be still owing to the corporation; and if it becomes insolvent, he may be compelled to pay the amount due, so far as its payment may be necessary to satisfy their claims. This liability may be enforced by a trustee in bankruptcy.

Mr. Bergson's subscriptions to the three thousand shares of stock in the Louis J. Bergdoll Motor Company obligated him to pay into its treasury $300,000. The actual value of the property that he

caused to be transferred to it did not exceed $144,428.03. He was, therefore, bound to pay, when demanded, the sum of $155,571.97. While no demand for payment of that amount, or any part of it, was ever made by the corporation, its insolvency had the same effect with respect to his unpaid subscription money as if a call for it has been made by its directors.

Of this liability Mr. Bergson was not relieved by the transfer of his shares in January, 1913, for, at that time the company was already insolvent. Insolvency fixes the relative rights of all the parties concerned.

The order made by the Referee in bankruptcy, (confirmed by the United States District Court), is conclusive of the fact that for [fol. 229] the payment of the creditors of the corporation an assessment on its shares was necessary and also as to the sum that must thus be raised for that purpose.

It thus appears that, apart from the question of the effect of the statute of limitations, the plaintiff's claim was established.

In Swearingen v. Sewickley Dairy Co., 198 Pa. 68 (1901), however, a case where the plea of the statute of limitations was set up against a bill filed by the assignee of an insolvent corporation to enforce for the benefit of its creditors payment of the balance owing on subscriptions to its stock, the Supreme Court laid down the rule that the right of recovery on unpaid stock subscriptions accrues when the corporation becomes insolvent and that the statute of limitations, therefore, begins to run from that date.

It was there said, per Mitchell, J., "It is the general rule that insolvency fixes the relative rights of all the parties concerned. From that moment the unpaid subscriptions become part of the assets for the payment of the creditors. It is true they are special, or, as they may be called, reserved assets, not to be put in distribution until the insufficiency of other assets is shown; but this is no reason why creditors may not proceed at once to show that fact."

On behalf of the palintiff it is argued that the rule just referred to has been abandoned, having been repudiated in Kirschler v. Wainwright, 255 Pa. 525 (1917). This contention, however, is without sound basis.

It is true that in the latter case the Supreme Court held that the statute of limitations runs against a claim founded on the double liability of the stockholders for the debts of a banking company, [fol. 230] imposed by a special statute by which the corporation was created, only from his judicial ascertainment of the fact of the necessity for the enforcement of such a liability. It was, however, pointed out by Chief Justice von Moschzisker that the effort in the matter then before the Court was to enforce a special statutory responsibility, and that in Pennsylvania a distinction has been drawn between a liability of that kind and the subscriber's liability for the full payment of a stock subscription. In his opinion the case of Swearingen v. Sewickley Dairy Co. is specifically referred to; and, while its facts are distinguished from those then under consideration, its authority as a precedent governing matters of the character of that involved in it was not questioned.

The facts in the case at bar bring it within the rule of Swearingen v. Sewickley Dairy Co.

It was obvious to all concerned, immediately upon the filing of the inventory and appraisement of the assets of the bankrupt's estate, that in order to pay the debts of the bankrupt all moneys owing on the subscriptions to its stock must be called in. It, therefore, then became incumbent on the creditors, if they wished to be paid, to take measures to bring about a formal assessment of the company's shares and the institution of a proper action to collect the amount so assessed. Under Swearingen v. Sewickley Dairy Co., the assessment should have been levied and the proceedings against the defendant should have been begun within six years from the declared or notorious insolvency of the corporation. We can find no authority for holding that delay in either of these steps for a longer period was made necessary by any fact that has been brought to our attention. [fol. 231] Had the petition for the calling in of the unpaid stock subscription been presented at an earlier date than 22 October, 1917, this action might have been begun long before 13 July, 1921. More than eight years elapsed between the date when the insolvency of the corporation was ascertained and the day when the writ in this case was sued out. We must hold that by the latter date the statute of limitations had already run in favor of the defendant, and that the plaintiff's claim is barred.

For the reason above indicated, judgment will be entered for the defendant non obstante veredicto.

IN COURT OF COMMON PLEAS

FINAL JUDGMENT

Febry. 13, 1924.—Motion granted and judgment is now ordered in favor of defendant and against the plaintiff non obstante veredicto, see opinion filed.

[fol. 232] IN COURT OF COMMON PLEAS

NOTICE OF QUESTIONS TO BE ARGUED ON APPEAL, AND EVIDENCE NOT INTENDED TO BE PRINTED, AS REQUIRED BY RULE 55 OF THE SUPREME COURT OF PENNSYLVANIA

Sur Appeal by Plaintiff from Judgment in Favor of Defendant to the Supreme Court of Pennsylvania, for the January Term, 1925, No. 18, for the Philadelphia District, sitting at Philadelphia.

Appellant gives notice that he intends to argue on the above appeal, the following:

1. Whether the statute of limitations begins to run against creditors of a bankrupt corporation for the balance due on a subscription to the capital stock of the bankrupt, from the date of the adjudication in

bankruptcy, in a case where, as here, at said date and for a long period thereafter, it could not be determined to what extent, if at all said balance would be required to meet the corporate debts.

2. In a proceeding in bankruptcy wherein the liability of the subscriber to pay the balance due on his subscription to the capital stock of the bankrupt is involved, is it not necessary to obtain from the District Court of the United States an order to levy an assessment on the capital stock for unpaid subscriptions to an amount required to pay the corporate debts, before a plenary action may be instituted for the purpose of determining the stockholder's individual liability.

[fol. 233] 3. Where proceedings are instituted by a trustee in bankruptcy to levy an assessment upon the capital stock of a corporation in four years, approximately, from the date of the adjudication in bankruptcy and the right of the trustee to an assessment is denied and contested by a stockholder owning all the corporate stock, with the result that the trustee's right to the assessment is sustained by the Court, is the statute a bar to a plenary suit to recover from the stockholder the amount of the assessment upon the stock, if, as here, the contest is not finally decided until more than six years after the adjudication in bankruptcy.

And the appellant further gives notice that he does not intend to print any part of the evidence, filed in this case (term and No. which appears below), as follows:

Notes of testimony, page 26 to and including "No cross-examination," page 61; page 75 (beginning "Bankrupt Schedules, etc.") to page 96, inclusive; page 148 (beginning, "In the District Court of United States for Eastern District of Pennsylvania") to and including "July 23, 1913," page 247; and pages 251 to 419, inclusive.

J. W. Catharine, Attorney for Appellant.

[fol. 234] Phila., Pa., 3/6, 1924.

To Harry C. Kohlhas, Esquire, and Walter B. Gibbons, Esquire, Philadelphia, Pa.

Dear Sirs: Please take notice that the foregoing is a copy of the questions intended to be argued by me on the appeal in re Frank A. Harrigan, Trustee of the Bankrupt Estate of the Louis J. Bergdoll Motor Company, a corporation organized under the laws of the State of Pennsylvania, v. Louis J. Bergdoll, now known as Louis J. Bergson, Court of Common Pleas No. 4, of June Term, 1921, No. 4989, and of the evidence not intended to be printed, which said evidence was filed in the above entitled case.

Your consent will be presumed thereto if no objections are made within ten days from this date.

Yours respectfully, J. W. Catharine, Attorney for Appellant.

Agreed to. —— ——, Attorneys for Appellee.

[fol. 235] IN COURT OF COMMON PLEAS

APPELLEE'S ANSWER TO APPELLANT'S NOTICE OF QUESTIONS TO BE ARGUED ON APPEAL AND EVIDENCE NOT INTENDED TO BE PRINTED

Sur appeal by plaintiff from judgment in favor of defendant, to the Supreme Court of Pennsylvania, for the January Term, 1924, No. 18, for the Philadelphia District, sitting at Philadelphia.

Louis J. Bergson, defendant in the above entitled cause, makes answer to the notice of appellant, as follows:

In the court below, the appellee having moved for judgment non obstante veredicto upon the whole record, urged the Court to sustain the motion upon four questions involved, any one of which was sufficient in itself, while the Court below entered judgment upon only one point, nevertheless, it is contended by the appellee that his position in reference to the other three points is sound in law and he intends to argue the same before the Supreme Court. The points upon which the appellee intends to argue are, as follows:

1. The claim is barred by the statute of limitations.

2. The appellee was not the holder of the stock at the time the alleged assessment was made nor was he the holder of the stock at the time of the adjudication in bankruptcy, and was therefore not liable to an assessment on the stock.

3. The subscription of the defendant to stock in the Louis J. Berg-[fol. 236] doll Motor Company was paid in full by the transfer to it of tangible assets worth at least $144,428.03 and that cancellation of a claim for $300,000, the payment of which that corporation had assumed and which matter was adjudicated before a Referee in Bankruptcy and not appealed from.

4. None of the creditors of the bankrupt corporation gave it credit upon the faith of the statement that its stock was fully paid.

The appellee therefore objects to any omission from printed record to be filed in this case.

The question as to whether or not a new trial should be granted was not passed upon by the Court below and should the Supreme Court decide the Court below erred in entering judgment non obstante veredicto, the record will not be before the Court to determine the question of re-trial and grave injustice might therefore result to the appellee.

Wherefore, appellee prays the Court of Common Pleas No. 4 of Philadelphia County to fix a time for hearing in order that a decision may be rendered as to whether or not the appellant shall print the full record in this case.

Respectfully submitted, (Sgd.) Harry C. Kohlhas, Jr., Walter B. Gibbons, Attorneys for Appellee.

[fol. 237] Sworn to by Louis J. Bergson. Jurat omitted in printing.

[fol. 238] In Supreme Court of Pennsylvania, Eastern District

No. 18, January Term, 1925

Frank A. Harrigan, Trustee of the Bankrupt Estate of the Louis J. Bergdoll Motor Company, Appellant,

v.

Louis J. Bergdoll, now known as Louis J. Bergson

Appeal from the Judgment of the Court of Common Pleas No. 4 of Philadelphia County

Opinion—Filed July 8, 1924

Frazer, J.:

Plaintiff as trustee of the bankrupt estate of the Louis J. Bergdoll Motor Company, sued to recover from defendant, who owned practically the entire capital stock of the bankrupt company, an assessment on stock not fully paid up made by the Referee in bankruptcy to raise funds to liquidate the cost of proceedings and the balance due creditors of the company after the property of the bankrupt corporation had been exhausted. Several defenses were advanced at [fol. 239] the trial, the only one, however, requiring consideration here is the one raising the applicability of the statute of limitations. The Bergdoll Motor Company was adjudicated a bankrupt on April 11, 1913. After the assets of the company were converted into cash and distributed among creditors, there remained a deficit of approximately $184,000. This situation made it apparent to all interested not only that the company was insolvent, but that there existed a large shortage for which the stockholders would be liable to the extent of the unpaid balance due on the stock held by them respectively. No action was taken to fix this liability until October, 1917, more than four years following the insolvency, at which time the trustee through his petition to the United States District Court for the Eastern District of Pennsylvania, asked that the stockholders be assessed in a sum sufficient to meet the deficit. The matter was submitted to a Referee who on February 14, 1918, ordered an assessment against stockholders of 51.85% of the par value of their shares, which sum did not exceed the amount remaining unpaid on stock held by defendant. An appeal was taken from this order to the United States District Court and subsequently to the United States Circuit Court of Appeals; both courts sustained the action of the Referee to the extent he determined the necessity for an assessment against shareholders, but reversed so far as it assumed to determine defendant's personal liability. It was sot until July 13, 1921, a period of more than eight years, from the date of the company's adjudication in bankruptcy and the time the amount of the deficit was known, that the present action was begun against Bergson. The

trial resulted in a verdict for plaintiff, the Court however, later entered judgment non obstante veredicto for defendant, holding the action was barred by the statute of limitations.

[fol. 240] The sole question for our determination is whether the statute began to run at the time the motor company was adjudicated a bankrupt and the estate found to be insolvent, viz., April 11, 1913, or wheher it did not begin to run until the date of final judgment of the United States Circuit Court of Appeals of March 27, 1920, sustaining the Referee's order for an assessment. This question has been answered in favor of the view adopted by the Court below, in the case of Swearingen v. Dairy Co., 198 Pa. 68; where we held the status of a stockholder so far as his liability to creditors of the company is concerned, is fixed at the time it becomes known the company is insolvent and will be obliged to call unpaid stock subscriptions to take care of its obligations. In that case we said (page 73), "So long as the corporation is solvent, the whole subscription is due in accordance with its terms and is payable when and as called for by the corporation. But when the corporation becomes insolvent, the contract between it and the subscriber is terminated and his debt to it then is only for such part of his subscription as is required to pay the corporate debts. It is a debt not to it in its own right, but in the right of its creditors. But it would seem that the status of the stockholder as holder of a fund liable at least contingently to the creditors, must be fixed at the time and by the fact of the ascertainment of insolvency. It is the general rule that insolvency fixes the relative rights of all parties concerned. From that moment the unpaid subscriptions become part of the assets for payment of the creditors. It is true they are special or as they may be called reserved assets not to be put in distribution until the insufficiency of the other assets is shown, but this is no reason why the creditors may not proceed at once to show that fact."

[fol. 241] This is in accord with the general rule that insolvency fixes the rights of all parties having claims against an insolvent estate. The liability of the stockholders, if any, for unpaid subscriptions, became fixed as soon as it definitely appeared the assets of the company were insufficient to pay its debts. It then became the duty of creditors, if they desired to obtain payment of their claims, to take steps to bring about a formal determination of the extent of the assessment on unpaid stock subscriptions necessary to liquidate the indebedtness and also to begin proper action to collect such amount from the respective shareholders within the time limited by the statute. Whether there may be circumstances in a particular case to excuse delay for a longer period than six years, need not be considered, however, because no such excuse appears in the present proceedings.

Kirschler v. Wainwright, 255 Pa. 525, relied on by appellant, dos not apply here. In that case the action was to enforce a statutory liability and not to secure payment of a balance due on a subscription for shares of stock as here. The difference between that case and

Swearingen v. Dairy Co., is made plain by the present Chief Justice in the opinion in the Kirschler case (page 533).

The petition to assess the stockholders was not presented to the Court until more than four years after the confirmation of the sale of the property of the corporation, at which time the exact amount of the deficiency in the assets was established.

Had such petition been presented promptly and diligently perused the running of the statute of limitations might have been stayed, that, however, was not done and the judgment of the Court below must be affirmed.

Judgment affirmed.

[fol. 242] IN SUPREME COURT OF PENNSYLVANIA

ASSIGNMENT OF ERROR

The Court below erred in entering judgment non obstante veredicto, as follows (page 230):

"The facts in the case at bar bring it within the rule of Swearingen v. Sewickley Dairy Co.

"It was obvious to all concerned, immediately upon the filing of the inventory and appraisement of the assets of the bankrupt's estate, that in order to pay the debts of the bankrupt all moneys owing on the subscriptions to its stock must be called in. It, therefore, then became incumbent on the creditors, if they wished to be paid, to take measures to bring about a formal assessment of the company's shares and the institution of a proper action to collect the amount so assessed. Under Swearingen v. Sewickley Dairy Co., the assessment should have been levied and the proceedings against the defendant should have been begun within six years from the declared or notorious insolvency of the corporation. We can find no authority for holding that delay in either of these steps for a longer period was made necessary by any fact that has been brought to our attention. Had the petition for the calling in of the unpaid stock subscription been presented at an earlier date than 22 October, 1917, this action might have been begun long before 13 July, 1921. More than eight years elapsed between the date when the insolvency of the corporation was ascertained and the day when the writ in this case was sued out. We must hold that by the latter date the statute of limitations had [fol. 243] already run in favor of the defendant, and that the plaintiff's claim is barred.

"For the reason above indicated, judgment will be entered for the defendant non obstante veredicto."

"FINAL JUDGMENT (2a)

"Februray 13, 1924.—Motion granted and judgment is now ordered in favor of the defendant and against the plaintiff non obstante veredicto." (See opinion filed.)

[fol. 244] IN SUPREME COURT OF PENNSYLVANIA

DOCKET ENTRIES

January Term, 1925

18. 2/16/24.
Joseph W. Catharine.
Harry C. Kohlas.
Walter B. Gibbons.

No. 4989, June Term, 1921

FRANK A. HARRIGAN, Trustee of the Bankrupt Estate of the Louis J. Bergdoll Motor Company, a Corporation Organized under the Laws of the State of Pennsylvania, Plaintiff,

vs.

LOUIS J. BERGDOLL, Now Known as LOUIS J. BERGSON, Defendant

Appeal of Plaintiff from the judgment.

Appeal from Court Common Pleas No. 4 of the County of Philadelphia.
Filed Feb. 14, 1924.
Eo die.—Certiorari exit, retble. first Monday January, 1925.
Feb. 14, 1924.—Petition to advance filed.
Eo die.—Affidavit of acceptance of service filed.
Feb. 21, 1924.—Answer to petition to advance filed.
2/21/24.—Granted; placed on list for week of May 19, 1924. R. V. M., C. J.
Feb. 21, 1924.—Certificate exit and sent to Prothonotary of Philadelphia Co.
Eo die.—Acknowledgment of certificate received and filed.
April 12, 1924.—Record returned and filed.
April 30, 1924.—Assignments of error filed.
[fol. 245] May 21, 1924.—Argued.
July 8, 1924.—Judgment affirmed. Opinion by Frazer, J.
July 19, 1924.—Remittitur exit and with record sent to Prothonotary of Phila. Co.
July 19, 1924.—Acknowledgment of Remittitur and record received and filed.
July 28, 1924.—Petition for recall of record filed.

And Now, to wit: July 29th, 1924, upon consideration of the annexed petition, it is ordered, adjudged and decreed that the record in the case be recalled from the office of the Prothonotary of the Court of Common Pleas No. 4, of Philadelphia County, and held in this court until September 1st, 1924, to await action by the Supreme Court of the United States upon Plaintiff-appellant's proposed petition for writ of certiorari directed to this court.

Simpson, J.

July 30, 1924.—Certificate of order exit and sent to Prothonotary of Philadelphia Co.

July 30, 1924.—Record returned and filed.

Sept. 2, 1924.—Remittitur & Record exit and sent to Prothonotary of Phila. Co.

Sept. 2, 1924.—Acknowledgment of record and remittitur received & Filed.

[fol. 246] IN SUPREME COURT OF PENNSYLVANIA

CLERK'S CERTIFICATE

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

I, Thomas Robins, Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire printed Record as brought before the Supreme Court for review, together with Docket Entries, Assignments of Error and Opinion of the Supreme Court, in the case of Frank A. Harrigan, Trustee of the Bankrupt Estate of Louis J. Bergdoll Motor Company, &c. vs. Louis J. Bergdoll, now known as Louis J. Bergson, at No. 18 January Term, 1925, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at Philadelphia, in the County of Philadelphia, in the said Eastern District of Pennsylvania, this 25th day of September, in the year of our Lord One Thousand Nine Hundred and Twenty-four.

Thomas Robins, Prothonotary. (Seal of the Supreme Court of Pennsylvania.)

[fol. 247] IN SUPREME COURT OF PENNSYLVANIA

JUDGE'S CERTIFICATE TO CLERK

I, Robert von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, that Thomas Robins was, at the time of signing the annexed attestation, and now is, Prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 25th day of September one thousand nine hundred and twenty-four.

Robert von Moschzisker, Chief Justice.

IN SUPREME COURT OF PENNSYLVANIA

CLERK'S CERTIFICATE TO JUDGE

I, Thomas Robins, Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, that the Honorable Robert von Moschzisker by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said Supreme Court of Pennsylvania, in and for the *the* Eastern District, at Philadelphia, this 25th day of September one thousand nine hundred and twenty-four.

Thomas Robins, Prothonotary.

[fol. 248] SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the Supreme Court of the State of Pennsylvania

ORDER GRANTING PETITION FOR CERTIORARI—Filed Nov. 17, 1924

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of Pennsylvania and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

FILED
SEP 27 1926
WM. R. STANSBU
CLERK

IN THE

UNITED STATES SUPREME COURT

October Term, 1925 No. 181

FRANK A. HARRIGAN, Trustee of the bankrupt estate of The Louis J. Bergdoll Motor Company, a corporation organized under the laws of the State of Pennsylvania,

Petitioner,

v.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

JOSEPH W. CATHARINE,
Attorney for Petitioner,
1500 Land Title Building,
Philadelphia, Penna.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1924. No. .

FRANK A. HARRIGAN, Trustee of the bankrupt estate of The Louis J. Bergdoll Motor Company, a corporation organized under the laws of the State of Pennsylvania,

Petitioner,

v.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Frank A. Harrigan, Trustee in Bankruptcy of The Louis J. Bergdoll Motor Company, respectfully represents:

That this petition is filed to obtain a review and determination by this Court of the final judgment

and decree of the Supreme Court of the Commonwealth of Pennsylvania, the court of last resort, entered on the 8th day of July, A. D. 1924, affirming the judgment of the Court of Common Pleas No. 4 of Philadelphia County, in the case of Frank A. Harrigan, Trustee in Bankruptcy of The Louis J. Bergdoll Motor Company, against Louis J. Bergdoll, now known as Louis J. Bergson, which judgment was entered against the plaintiff-petitioner and in favor of the defendant-respondent *non obstante veredicto*. On February 15, 1923, the verdict was rendered for the plaintiff-petitioner, by direction of the Court, for the sum of $192,909.24.

A duly certified copy of the transcript of the entire record in this case is herewith filed as an Exhibit to this petition.

The questions involved in the cause are as follows:

(1) Where a Trustee in Bankruptcy, proceeding in conformance with the Federal Bankruptcy Act and the practice thereunder, to collect an asset of a bankrupt estate, obtains an order from a Referee in Bankruptcy within six years from the date of bankruptcy, assessing a person upon a stock liability, and the person so assessed filed a petition for review to the District Court of the United States, which Court confirmed said order of assessment, and he then appealed from said confirmance of said order of assessment to the United States Circuit Court of Appeals which affirmed the order of the District Court, can a State court apply against the Trustee in Bankruptcy a state statute of limitations of six years where the running of the statute of limitations was made possible by the action of the defendant in appealing from said orders?

(2) Where a suit is brought by a Trustee in Bankruptcy in a State court upon a decree of a United States court, ordering an assessment upon a stock liability against a defendant, does the statute of limitations run against the trustee, as found by the State court, from the date of insolvency of the corporation, or does it run from the date of the decree of the United States court finally ordering the assessment?

(3) Where there is a conflict of decisions in the highest court of a State, upon the subject of the application of the statute of limitations, applied to the liability of stockholders of corporations, will the Supreme Court of the United States be bound by the decision of the Court in this case, or apply the rule as laid down by it in like cases?

(4) Where a trustee, appointed under the Bankruptcy Act of the United States, sought to recover an asset of the bankrupt estate under that Act, and a State court applied a State statute of limitations against his right of action which accrued by reason of his authority under the Federal Bankrupt laws, was he not denied a right or title specially claimed under a law of the United States which entitles him to a review by this Court?

The following are the facts in this case:

On April 13, 1913, The Louis J. Bergdoll Motor Company was adjudicated a bankrupt in the United States District Court for the Eastern District of Pennsylvania, and thereafter Frank A. Harrigan was duly elected and appointed trustee. The said bankrupt company was a Pennsylvania corporation, incorporated March 18, 1912, with an authorized

capital stock of $500,000.00. 3,000 shares of the par value of $100.00 each were issued as follows:

Louis J. Bergdoll, now Bergson,	2998 shares
E. L. Webster	1 share
Frank J. Fanning	1 share.

1. Thereafter the trustee proceeded to administer the bankrupt estate, collect the assets, and reduce the claims. A comprehensive view of this work will be found by reference to the docket entries in the case in the District Court of the United States for the Eastern District of Pennsylvania (Record, pp. 113a to 121a, inclusive), and by reference to the docket entries of proceedings before the Referee in Bankruptcy in the same case (Record, pp. 125a to 138a, inclusive).

2. The matters involved large sums and were important. Among them was a claim for $310,000.00 filed by the defendant-respondent, and after opposition by the Trustee in Bankruptcy it was reduced to $10,000.00. A suit was brought by the Trustee in Bankruptcy against Erwin R. Bergdoll, a brother of the defendant-respondent, claiming $31,270.00 paid him as a preference by the bankrupt, which suit was tried in the District Court of the United States for the Eastern District of Pennsylvania, resulting in a verdict for the trustee in the sum of $33,370.35. An appeal was taken by that defendant to the Court of Appeals, which affirmed the judgment, and he then sued out a writ of error to the Supreme Court of the United States, which writ of error was dismissed by that court upon motion of the Trustee in Bankruptcy (see docket entries, Record, pp. 123a and 124a).

3. In the course of proceedings in bankruptcy it appeared that the 3,000 shares of the capital stock of the bankrupt company of the par value of

$300,000.00 were issued to Bergdoll, Webster and Fanning, by the bankrupt, for assets of the value of approximately $145,000.00.

4. After all other matters in the bankruptcy proceeding had been closed, and in conformance with the Federal bankrupt laws and procedure thereunder, on October 22nd, 1917, the trustee filed a petition for an assessment upon the capital stock of the bankrupt and for leave to institute proceedings to recover unpaid subscriptions (Record, p. 139a).

5. On November 15, 1917, the defendant-respondent filed an answer to said petition (Record, p. 144a), wherein he denied the right of the trustee to an assessment on the stock of the bankrupt company.

6. On May 9, 1918, the Referee filed an opinion, making an order of asessment, and on May 18, 1918, on the petition of the defendant-respondent, extended the time for filing a petition for review to May 22, 1918. On May 29, 1918, the defendant-respondent filed a petition for the review of the Referee's order which was entered May 20, 1918, and a certificate for review was duly filed on June 26, 1918, in the United States District Court for the Eastern District of Pennsylvania. On November 13, 1918, the United States District Court referred the matter back to the Referee for further proceedings (Record, pp. 137a and 138a).

7. Hearings and arguments were had before the Referee on the questions involved, and on February 14, 1919 (Record, pp. 137a and 138a), the Referee entered his final order, making an assessment of 51.85% of the par value of the said 3,000 shares of capital stock of said bankrupt company, to wit: the sum of $155,571.97, with interest thereon from April 1, 1912, and ordering the defendant-respondent to

pay to the trustee the amount thereof, to wit: the sum of $219,771.34.

8. On February 24, 1919 (Record, p. 120a), the defendant-respondent presented and filed and was granted an order extending the time within which he might file his petition for review of the Referee's order until March 6, 1919, and on March 15, 1919, the proceedings before the Referee, assessing the stock, were filed in the United States District Court for the Eastern District of Pennsylvania and on July 1, 1919, the United States District Court by Judge Dickinson (Record, p. 121a), filed an opinion denying the defendant-respondent's petition for review, approving the findings of the Referee, and affirming and confirming the order made.

9. On July 10, 1919 (Record, p. 121a), the defendant-respondent presented a petition for the allowance of an appeal to the Circuit Court of Appeals for the Third Circuit, appealing from the order of the United States District Court affirming and confirming the order of the Referee making the assessment and directing the defendant-respondent to pay $219,771.34 to the trustee. On March 29, 1920, the mandate of the United States Circuit Court of Appeals was filed in the United States District Court, reversing the decree of the District Court insofar as it fixed personal liability on the defendant-respondent and the amount thereof, but insofar as it adjudicated the necessity for an assessment on the stock of the bankrupt, the right thereto, and those who appeared *prima facie* subject to the assessment, it was affirmed. (See *Bergdoll v. Harrigan*, 263 Fed. p. 283.)

10. Thereafter on July 13, 1921, the Trustee in Bankruptcy brought a suit in the Court of Common Pleas No. 4 of Philadelphia County against the defen-

dant-respondent *upon the original order and decree for assessment on the bankrupt's stock*, made by the Referee in Bankruptcy and as finally affirmed by the United States Circuit Court of Appeals for the Third Circuit (see Statement of Plaintiff's Claim in that suit, Record, pp. 7a and 8a), and to this suit the defendant-respondent filed an affidavit of defense (Record, pp. 14a, *et seq.*), wherein he set up the following defenses:

> "1st. That his subscription to stock in The Louis J. Bergdoll Motor Company was paid in full by the transfer to it of tangible assets worth, at least, $144,428.03 and the cancellation of a claim for $300,000, the payment of which that corporation had assumed.
>
> 2nd. That none of the creditors of the bankrupt corporation gave it credit upon the faith of the statement that its stock was fully paid.
>
> 3rd. That the stock originally issued to or for him was transferred to others while the corporation was still solvent.
>
> 4th. That the claim is barred by the statute of limitations."

11. Upon these issues, as framed, the cause proceeded to trial before the Honorable Charles Y. Audenried, President Judge of Court of Common Pleas No. 4 of Philadelphia County and a jury, on the 14th day of February, 1923, and on the 15th day of February, 1923, the Court directed the jury to find a verdict for the plaintiff-petitioner in the sum of $192,909.24, whereupon the jury rendered a verdict for the trustee in that amount (see Charge of Court, Record, pp. 93a, *et seq.*).

12. On February 19, 1923, the defendant-respon-

dent filed a motion for a new trial and for judgment *non obstante veredicto*, which motions were duly argued before the Court of Common Pleas No. 4 *en banc*, and on February 13, 1924, in an opinion by Audenried, J., the Court granted defendant-respondent's motion for judgment *non obstante veredicto* and entered judgment in favor of the defendant-respondent and against the plaintiff-petitioner, the Court saying in its opinion (Record, p. 229a):

> "*It thus appears that, apart from the question of the effect of the statute of limitations, the plaintiff's claim was established.* • • • We must hold that • • • the statute of limitations had already run in favor of the defendant, and that the plaintiff's claim is barred."

13. From this judgment the Trustee in Bankruptcy prosecuted his appeal to the Supreme Court of the Commonwealth of Pennsylvania, and on July 8, 1924, that Court, in an opinion by Frazer, J., affirmed the judgment of the Court of Common Pleas No. 4. The opinion of that Court is attached to and made part of the record filed herewith.

REASONS FOR THE ALLOWANCE OF WRIT OF CERTIORARI.

I.

Your petitioner shows to your Honorable Court that he proceeded in the bankruptcy court with as much diligence as the nature of the case permitted, and that, except for the appeals against the order of assessment by the defendant-respondent, he

would have been able to bring action within six years from the date of the insolvency of the corporation, even should the Supreme Court of Pennsylvania be correct in holding that the statute ran from the date of insolvency and not from the date of the assessment and order in bankruptcy, as has been repeatedly held by your Honorable Court and courts in other jurisdictions.

II.

While the appeals of the defendant-respondent were pending against the order of assessment, no other action could have been brought by the trustee because the District Court of the United States had jurisdiction of all the parties and the subject matter, and had the order been finally affirmed or reversed in its entirety by the Court of Appeals, it would have finally ended the litigation. Consequently, no suit could have been properly brought by the trustee until the defendant-respondent's appeals had been passed upon by the United States Courts of bankruptcy, and in the application of the statute of limitations the State courts gave no consideration to these proceedings, which were had between the same parties and upon the same subject matter.

III.

To permit this judgment to stand will cause a conflict of decisions in the proper administration of bankruptcy, and the creditors of this bankrupt es-

tate will be penalized because the trustee followed strictly the procedure as laid down by your Honorable Court in bankruptcy matters affecting causes of this character, while the defendant, who delayed the matter by his appeals until such time as the statute ran, as found by the Supreme Court of Pennsylvania, will profit thereby: *Scoville v. Thayer*, 105 U. S. 143.

IV.

Your petitioner insists to your Honorable Court that in a bankruptcy proceeding the statute should run necessarily from the date of the order of assessment and not from the date of the insolvency, because of the great length of time necessary to properly administer an involved estate, as this was, and particularly in this case where the defendant, who invokes the bar of the statute of limitations, was an active and the sole party in interest to all the proceedings had to fix his liability in the United States courts. This was no assertion of a stale claim against him.

V.

The guide for the trustee in this proceeding was the opinion of your Honorable Court in *Scoville v. Thayer*, 105 U. S. pp. 155, 156, 157 and 158, where the liability of the defendant, Thayer, was a secondary liability, as in the instant case.

VI.

Your petitioner shows to your Honorable Court that the cause of action upon which this suit was brought was not the original contract or obligation of the defendant-respondent to pay, but *was the decree of the United States District Court for the Eastern District of Pennsylvania in Bankruptcy* (opinion of trial Judge, Record, p. 224a), and that the petition for that order was filed on October 22, 1917, less than six years after the date of bankruptcy; and if a State statute of limitations would run against a decree of a court in such a case, it would only be from the time the said order became final.

VII.

Under paragraph 237 of the Judicial Code your Honorable Court has jurisdiction to review the final judgment of the Supreme Court of the Commonwealth of Pennsylvania, because the suit was brought by a trustee in bankruptcy, in virtue of the power and authority conferred upon him by a law of the United States, seeking to recover what was asserted to be an asset of the bankrupt estate under that law. Therefore, a Federal question is presented in this case, and the denial of the asserted right was a denial of a right or title specially claimed under a law of the United States: *Rector, Trustee v. City Deposit Bank Co.*, 200 U. S. p. 411; *Rector, Trustee v. Commercial National Bank*, 200 U. S. p. 423. Both of these opinions were by the late Chief Justice, Honorable Edward D. White.

For the above reasons your petitioner respectfully prays that this Honorable Court issue a writ of certiorari under its seal, directed to the said Supreme Court of the Commonwealth of Pennsylvania, commanding the said court to certify and send to it, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the Supreme Court of the Commonwealth of Pennsylvania in said cause therein, entitled:

"January Term, 1925. No. 18.

FRANK A. HARRIGAN, Trustee of the Bankrupt Estate of The Louis J. Bergdoll Motor Company, a corporation organized under the laws of the State of Pennsylvania,

Appellant,

v.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON,"

to the end that the said cause and proceedings may be reviewed and determined by this Honorable Court; that the errors which have occurred therein may be corrected, and that said judgment of the said Supreme Court of the Commonwealth of Pennsylvania be reversed, and that petitioner may have such other and further relief as may be appropriate.

Respectfully submitted,

JOSEPH W. CATHARINE,

Attorney for Petitioner.

FILED
OCT 31 1925
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

October Term, 1925. No. 181.

FRANK A. HARRIGAN, Trustee of the Bankrupt Estate of the LOUIS J. BERGDOLL MOTOR COMPANY,
Petitioner,

v.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON.

PETITIONER'S BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

Petition for Certiorari filed September 27, 1924.
Certiorari granted November 17, 1924.
(30,633)

FRANK A. HARRIGAN,
JOSEPH W. CATHARINE,
Attorneys for Petitioner,
Franklin Trust Building,
Philadelphia, Pa.

I. F. Huntzinger Co., Appellate Printers, Camden, N. J.

IN THE

Supreme Court of the United States

October Term, 1925. No. 181.

FRANK A. HARRIGAN, Trustee of the Bankrupt Estate of the LOUIS J. BERGDOLL MOTOR COMPANY,
Petitioner,

v.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON.

PETITIONER'S BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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Judicial Code, Act of Congress March 3, 1911, c. 231, 36 Stat. 1087, par. 237. 2

Judiciary Act, Act of Congress September 24, 1789, c. 20, Sec. 34. 21

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IN THE

Supreme Court of the United States

October Term, 1925. No. 181.

FRANK A. HARRIGAN, Trustee of the Bankrupt Estate of the LOUIS J. BERGDOLL MOTOR COMPANY,
Petitioner,

v.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON.

PETITIONER'S BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

This case was decided in the Supreme Court of Pennsylvania and is reported as HARRIGAN, TRUSTEE, APPELLANT v. BERGDOLL, 281 Pa. 186.

The opinion of the Supreme Court of the Commonwealth of Pennsylvania is printed in full (R. 128, 129, 130).

The final judgment was rendered by the Supreme Court of the Commonwealth of Pennsylvania in an opinion filed July 8, 1924 (R. 128).

The petitioner's specific claim is that the state courts of Pennsylvania were without power to apply a state stat-

ute of limitations against a suit brought upon a decree of the United States Court until six years after the entry of such decree, and that the entry of such decree in the United States District Court in Bankruptcy fixed the beginning of the cause of action against Bergdoll, before which time the trustee had no cause of action. This contention was decided adversely to the petitioner by the Court of Common Pleas No. 4 of Philadelphia County, Pennsylvania, in an opinion filed (R. 121, 122, 123, 124, 125), and it was subsequently affirmed by the Supreme Court of Pennsylvania in the opinion above referred to (R. 128).

This suit having been brought by a Trustee in Bankruptcy under and by virtue of his appointment under the Federal Bankruptcy law, in an endeavor to collect an asset for the creditors of a bankrupt estate, which right was denied him, under paragraph 237 of the Judicial Code this Court has jurisdiction to review the final judgment of the Supreme Court of Pennsylvania because such denial was a denial of a right or title specially claimed under a law of the United States. That the foregoing view is correct is borne out by the decisions of your Honorable Court in Rector, Trustee v. City Deposit Bank Co., 200 U. S. 411, and Rector, Trustee v. Commercial National Bank, 200 U. S. 423, in which cases the opinions were written by the late Chief Justice Honorable Edward D. White.

The following is a concise statement of the facts necessary to a consideration of the questions involved:

1. On April 13, 1913, The Louis J. Bergdoll Motor Company was adjudicated a bankrupt in the United States District Court for the Eastern District of Pennsylvania, and thereafter Frank A. Harrigan was duly elected and appointed trustee. The said bankrupt company was a Pennsylvania corporation, incorporated March 18, 1912, with an authorized capital stock of $500,000.00. 3,000 shares of the par value of $100.00 each were issued as follows:

Louis J. Bergdoll, now Bergson,	2998 shares
E. L. Webster	1 share
Frank J. Fanning	1 share.

2. Thereafter the trustee proceeded to administer the bankrupt estate, collect the assets, and reduce the claims. A comprehensive view of this work will be found by reference to the docket entries in the case in the District Court of the United States for the Eastern District of Pennsylvania (R. 61-66), and by reference to the docket entries of proceedings before the Referee in Bankruptcy in the same case (R. 66-75).

3. The matters involved large sums and were important. Among them was a claim for $310,000.00 filed by the respondent, and after opposition by the Trustee in Bankruptcy it was reduced to $10,000.00. A suit was brought by the Trustee in Bankruptcy against Erwin R. Bergdoll, a brother of the respondent, claiming $31,270.00 paid him as a preference by the bankrupt, which suit was tried in the District Court of the United States for the Eastern District of Pennsylvania, resulting in a verdict for the trustee in the sum of $33,370.35. An appeal was taken by that defendant to the Court of Appeals, which affirmed the judgment, and he then sued out a writ of error to the Supreme Court of the United States, which writ of error was dismissed by that court upon motion of the Trustee in Bankruptcy (R. 66, 67).

4. In the course of proceedings in bankruptcy it appeared that the 3,000 shares of the capital stock of the bankrupt company of the par value of $300,000.00 were issued to Bergdoll, Webster and Fanning, by the bankrupt, for assets of the value of approximately $145,000.00.

5. After all other matters in the bankruptcy proceeding had been closed, and in conformance with the Federal bankrupt laws and procedure thereunder, on October 22nd, 1917, the trustee filed a petition for an assessment upon the capital stock of the bankrupt and for leave to institute proceedings to recover unpaid subscriptions (R. 75).

6. On November 15, 1917, the respondent filed an answer to said petition (R. 78), wherein he denied the right of the trustee to an assessment on the stock of the bankrupt company.

7. On May 9, 1918, the Referee filed an opinion, making an order of assessment, and on May 18, 1918, on the petition of the respondent, extended the time for filing a petition for review to May 22, 1918. On May 29, 1918, the respondent filed a petition for the review of the Referee's order which was entered May 20, 1918, and a certificate for review was duly filed on June 26, 1918, in the United States District Court for the Eastern District of Pennsylvania. On November 13, 1918, the United States District Court referred the matter back to the Referee for further proceedings (R. 65).

8. Hearings and arguments were had before the Referee on the questions involved, and on February 14, 1919 (R. 52, 53, 54), the Referee entered his final order, making an assessment of 51.85% of the par value of the said 3,000 shares of capital stock of said bankrupt company, to wit: the sum of $155,571.97, with interest thereon from April 1, 1912, and ordering the defendant-respondent to pay to the trustee the amount thereof, to wit: the sum of $219.771.34.

9. On February 24, 1919 (R. 65), the respondent presented and filed and was granted an order extending the time within which he might file his petition for review of the Referee's order until March 6, 1919, and on March 15, 1919, the proceedings before the Referee, assessing the stock, were filed in the United States District Court for the Eastern District of Pennsylvania and on July 1, 1919, the United States District Court by Judge Dickinson (R. 65), filed an opinion denying the respondent's petition for review, approving the findings of the Referee, and affirming and confirming the order made.

10. On July 10, 1919 (R. 65), the respondent presented a petition for the allowance of an appeal to the Circuit Court of Appeals for the Third Circuit, appealing from the order of the United States District Court affirming and confirming the order of the Referee making the assessment and directing the respondent to pay $219,771.34 to

the trustee. On March 29, 1920, the mandate of the United States Circuit Court of Appeals was filed in the United States District Court, reversing the decree of the District Court in so far as it fixed personal liability on the respondent and the amount thereof, but in so far as it adjudicated the necessity for an assessment on the stock of the bankrupt, the right thereto, and those who appeared *prima facie* subject to the assessment, it was affirmed (see BERGDOLL v. HARRIGAN, 263 Fed. 279).

11. Thereafter on July 13, 1921, the Trustee in Bankruptcy brought a suit in the Court of Common Pleas No. 4 of Philadelphia County against the respondent *upon the original order and decree for assessment on the bankrupt's stock*, made by the Referee in Bankruptcy and as finally affirmed by the United States Circuit Court of Appeals for the Third Circuit (see Statement of Plaintiff's Claim in that suit, R. 2, 3, 4, 5, 6, 7), and to this suit the respondent filed an affidavit of defense (R. 7, *et seq.*), wherein he set up the following defenses:

"1st. That his subscription to stock in The Louis J. Bergdoll Motor Company was paid in full by the transfer to it of tangible assets worth, at least, $144,428.03 and the cancellation of a claim for $300,000, the payment of which that corporation had assumed.

2nd. That none of the creditors of the bankrupt corporation gave it credit upon the faith of the statement that its stock was fully paid.

3rd. That the stock originally issued to or for him was transferred to others while the corporation was still solvent.

4th. That the claim is barred by the statute of limitations."

12. Upon these issues, as framed, the cause proceeded to trial before the Honorable Charles Y. Audenried, President Judge of Court of Common Pleas No. 4 of Philadelphia County, and a jury, on the 14th day of February, 1923, and on the 15th day of February, 1923, the Court directed the jury to find a verdict for the petitioner in the sum of $192,909.24, whereupon the jury rendered a verdict for the trustee in that amount (see Charge of Court, R. 50, *et seq.*).

13. On February 19, 1923, the respondent filed a motion for a new trial and for judgment *non obstante veredicto*, which motions were duly argued before the Court of Common Pleas No. 4 *en banc*, and on February 13, 1924, in an opinion by Audenried, J., the Court granted respondent's motion for judgment *non obstante veredicto* and entered judgment in favor of the respondent and against the petitioner, the Court saying in its opinion (R. 121):

> "*It thus appears that, apart from the question of the effect of the statute of limitations, the plaintiff's claim was established.* • • • We must hold that • • • the statute of limitations had already run in favor of the defendant, and that the plaintiff's claim is barred."

14. From this judgment the Trustee in Bankruptcy prosecuted his appeal to the Supreme Court of the Commonwealth of Pennsylvania, and on July 8, 1924, that Court, in an opinion by Frazer, J., affirmed the judgment of the Court of Common Pleas No. 4. The opinion of that Court is attached to and made part of the record filed herewith (R. 128).

ARGUMENT.

The trustee-petitioner proceeded against the respondent, upon a decree of the United States District Court in Bankruptcy, to collect the difference in value between assets which the respondent actually turned over to the Bergdoll Motor Car Company and $300,000 worth of stock which was issued to him therefor. The date of the bankruptcy was April 11, 1913 (R. 62), and the trustee-petitioner filed his petition for the assessment against the respondent on October 22, 1917 (R. 75). The respondent filed an answer to the trustee's petition on November 15, 1917 (R. 78), wherein he contested the right of the trustee to an assessment on the following grounds: (1) That said stock was issued full paid and non-assessable for the assets of the New Jersey corporation; (2) that no stock was subscribed for by anyone in the Pennsylvania corporation; (3) that his liability was *res adjudicata;* (4) that he was not a stockholder of either corporation when the Pennsylvania company was adjudicated bankrupt, or when the petition was filed; (5) that the company was solvent when he assigned his stock.

Hearings were had and the respondent bitterly contested the right of the trustee-petitioner to an assessment, and finally, on February 14, 1919, the Referee entered an order making an assessment against him of .5185% of the par value of 3,000 shares of stock and interest (R. 5, 54). Thereupon the respondent filed a petition to the United States District Court to revise, which Court affirmed and confirmed the order of the Referee (R. 74), whereupon he appealed to the United States Circuit Court of Appeals of the Third Circuit, which tribunal reversed the order in so far as it fixed respondent's personal liability, but in so far as said decree adjudicated the necessity for an assessment of the stock of the bankrupt and the rate thereof, and to those *prima facie* subject to the assessment, the decree was affirmed (R. 16) (see HARRIGAN v. BERGDOLL, 263 Fed. 279).

The final order by the Circuit Court of Appeals in the matter was March 27, 1920 (R. 55). The petition for the assessment was filed by the trustee-petitioner on October 22, 1917, and, due to the contest of the respondent and his appeals from said orders, there was a delay of two years and five months.

When the decree became final the trustee-petitioner went into the Court of Common Pleas No. 4 Philadelphia County and brought suit July 13, 1921, upon the decree as his cause of action (R. 2), and the respondent set up as defenses the same reasons advanced in the bankruptcy proceedings, with the additional one of the plea of the bar of the statute of limitations. The Court directed judgment in favor of the trustee-petitioner on the 15th day of February, 1923, for $192,909.24, and upon the respondent's motion for a new trial and judgment *non obstante veredicto*, the Court of Common Pleas overruled the motion for new trial but granted judgment *non obstante veredicto* and entered judgment against the trustee-petitioner, the Court saying in its opinion (R. 121): "It thus appears that, apart from the question of the effect of the statute of limitations, the plaintiff's claim is established. We must hold that the statute of limitations had already run in favor of the defendant."

An appeal was taken by the trustee-petitioner to the Supreme Court of the Commonwealth of Pennsylvania, which, in an opinion (HARRIGAN v. BERGDOLL, 281 Pa. 186), affirmed the judgment of the court below upon the authority of SWEARINGEN v. DAIRY CO., 198 Pa. 68.

The proposition advanced by the trustee-petitioner is as follows: That when the decree of the United States District Court became final, then and then only was his cause of action established; and that his cause of action dated from that time. Consequently, the State Court was without power, where the suit had been brought upon the decree of the United States Court, to go behind that decree and say that the cause of action antedated the date of the decree sued upon and that therefore the statute of limitations was applicable from the earlier date. The facts in SWEARINGEN v. DAIRY CO., 198 Pa. 68, were quite

different from those in the case at bar, and were as follows: The directors authorized an assessment in 1889 for 25% of the stock subscription, but the call was not actually made. In that case a *definite sum* was due and unpaid. In 1891, the company made an assignment for the benefit of creditors. The assignee made no effort to collect the delinquent subscriptions; or to have any call or assessment made therefor. In 1899, or about eight years after the assignment, and ten years after the call was authorized, a creditor's bill was filed to collect the balance due on the subscription. Defendant pleaded laches and bar of statute. The plaintiffs contended that, as no call had been made by the corporation for the balance due on the subscription, the statute of limitations did not begin to run and the plaintiffs could, therefore, maintain the bill. Held, that the right of action accrued upon the insolvency of the company, shown by the assignment for the benefit of creditors, and that the statute of limitations began to run from that date. In that case, the exact sum due by the stockholder was known and the creditors, upon his refusal to act, had the undoubted right to institute proceedings against the delinquent stockholders.

Whereas, in the instant case, at the time of the bankruptcy, there was nothing due from the respondent to the corporation as, between him and it, everything had been paid. There was, however, a contingent liability on his part to pay for his stock the difference between its real value and what he actually paid in assets, provided there was a deficiency in the assets to pay creditors. The proceedings in bankruptcy were had to that end, and the last thing done by the trustee after all claims were reduced and all assets collected, was to file a petition to compel the respondent to pay, and this was within six years from the date of bankruptcy. It must be taken into consideration that, in an involved bankruptcy case, the liability of individuals is not always apparent immediately at the time of the inception of proceedings, but usually develops after close examination of the bankrupt's affairs. Just when this occurred in the present proceedings does not appear.

The facts in this case are controlled by the opinion of this Court in SCOVILL v. THAYER, 105 U. S. 153, 154, 155, 156, 157, 158, opinion by Mr. Justice Woods:

> "We are next to consider whether, upon the facts as disclosed by the record, the defense of the Statute of Limitations should have been sustained. The precise question with which we have to deal is, when would this action at law, brought by the assignees of the bankrupt Company against a stockholder to recover a part of the balance due on his stock, be barred by the statute?
>
> "This will depend on the answer to the question, when did the cause of action accrue to the assignees? In other words, when could they have commenced this action against this defendant to recover the amount due on his stock? Wilcox v. Plummer, 4 Pet. 172; Amy v. Dubuque, 98 U. S. 470 (XXV., 228).
>
> "The stock held by the defendant in error was evidenced by certificates of full paid shares. It is conceded to have been the contract between him and the Company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the Company this was a perfectly valid agreement. It was not forbidden by the charter of the Company or by any law or public policy, and as between the Company and its stockholders was just as binding as if it had been expressly authorized by the charter.
>
> "If the Company, for the purpose of increasing its business, had called upon the stockholders to pay up that part of their stock which had been satisfied 'by discount,' according to their contract the stockholders could have successfully resisted such a demand. No suit could have been maintained by the Company to collect the unpaid stock for such a purpose. The shares were issued as full paid, on a fair understanding, and that bound the Company.

"In fact, it has been held in recent English cases that not only is the Company, but its creditors also, bound by such a contract. Waterhouse v. Jamieson, L. R. 2 H. L., Sec. 29; Currie's Case, 3 De G., J. & S., 367; Carling, H. & W. cases, L. R. 1 Ch. Div. 115.

"But the doctrine of this court is, that such a contract, though binding on the Company, is a fraud in law on its creditors, which they could set aside; that when their rights intervene, and to satisfy their claims, the stockholders could be required to pay their stock in full. Sawyer v. Hoag, 17 Wall. 610 (84 U. S., XXI., 731); New Albany v. Burke, 11 Wall. 96 (78 U. S. XX., 155); Burke v. Smith, 16 Wall. 390 (83 U. S. XXI., 361).

"The reason is, that the stock subscribed is considered in equity as a trust fund for the payment of creditors. Wood v. Dummer, 3 Mason, 308; Mumma v. Potomac Co., 8 Pet. 286; Ogilvie v. Ins. Co., 22 How. 387 (63 U. S. XVI. 351); Sawyer v. Hoag, *ubi supra.* It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor has, therefore, the right to presume that the stock subscribed has been or will be paid up, and if it is not, a court of equity will at his instance, require it to be paid.

"In this case, the managers and agents of the bankrupt Company had in effect represented to the public that all its capital stock had been subscribed for and had been or would be paid in full. Considered, therefore, in the view of a court of equity, the contract between the Company and its stockholders was this, namely: that the stockholders should pay, say, for example, $20 per share on their stock and no more unless it became necessary to pay more to satisfy the creditors of the Company, and when the necessity arose, and the amount required was ascertained, then to make such additional payment on the stock as the satisfaction of the claims of creditors required.

"When the Company was adjudicated a bankrupt, the assignees were bound by this contract, thus equit-

ably construed. Their duty was to collect a sufficient sum upon the unpaid stock which, with the other assets of the Company, would be sufficient to satisfy the Company's creditors. They were authorized to collect no more. If it should turn out that the other assets were sufficient, no action would lie against the stockholder for the balance due on his stock. For, if in a bankruptcy proceeding any surplus remained after payment of debts, it would go to the Company, and not to the stockholders. And we have seen the Company in this case would have no right to any surplus.

"The question for solution is, therefore, when, under the facts of this case, did the cause of action accrue against the defendant in error? Certainly not until it became his duty to pay, according to the terms of his contract, or according to law.

"It is well settled that when stock is subscribed to be paid upon call of the Company, and the Company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The Court will do what it is the duty of the Company to do. Curry v. Woodward, 53 Ala. 371; Robinson v. Bk., 18 Ga. 65; Ward v. Mfg. Co., 16 Conn. 593. But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the Company, there must be some order of a Court of competent jurisdiction, or at the very least, some authorized demand upon him for payment. And it is clear the Statute of Limitations does not begin to run in his favor until such order or demand. Van Hook v. Whitlock, 3 Paige, 409; Salisbury v. Black, 6 Har. & J. 293; Sinkler v. Turnpike Co., 3 Pa. 149; Walter v. Walter, 1 Wharton 292; Quigg v. Kittredge, 18 N. H. 137; Nimmo v. Walker, 14 La. Ann. 589.

"In this case there was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment.

The defendant in error owed the creditors nothing, and he owed the Company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the Company his obligation was to pay to the assignees, upon demand, such amount upon his unpaid stock as would be sufficient, with the other assets of the Company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete.

"But not only was it necessary that the amount required to satisfy creditors should be ascertained, but that the agreement between the Company and the stockholder to the effect that the latter should not be required to make any further payments on his stock should be set aside as in fraud of creditors. No action at law would lie to recover the unpaid balance due on the stock until this was done. The proceedings for an assessment in the bankruptcy court was, in effect, a proceeding to accomplish two purposes: first, to set aside the contract between the Company and the stockholder; and, second, to fix the amount which the stockholder should be required to pay. Until these things were done the cause of action against the stockholder did not accrue, although his primary obligation was assumed at the time when he subscribed the stock.

"It appears from the petition of the assignees, plaintiffs in error, for an assessment upon the stock of the bankrupt Company, that they had used due diligence to ascertain what additional payments on the stock would be required to pay off the claims of creditors; that at as early a time as possible they applied to the Court for an order directing that the stockholders should pay a part of the amount due on their shares of stock, and assessing the stock therefor; that the order was made accordingly, and within five months thereafter this action at law was begun to enforce its payment.

"If, therefore, the right to bring this suit did not accrue to the assignees until the assessment was made upon the stock by the Court and the stockholders required to pay it, the action was brought long before the limitation of the statute could bar it.

"All the delay which has occurred has been caused by the proceedings of the assignees, taken for the benefit of the stockholders, in order that they might not be subjected to unnecessary and onerous exactions. The lapse of time between the filing of the petition for the assessment and the decree of the bankruptcy court thereon is chargeable to continuances made by order of the Court and to the opposition of the stockholder referred to. It does not lie in the mouth of the defendant in error to say that while the steps necessary to fix his liability and limit its amount were being taken, the bar of the statute has intervened and cut off his liability altogether.

* * * * * * * *

"The case of Terry v. Anderson, 95 U. S. 628 (XXIV., 365), also relied on by defendant in error, was a suit in equity to enforce the individual liability of the stockholders of a bank and to collect unpaid subscriptions to its capital stock. There was no agreement on the part of the bank not to collect the balance due on the stock. The bank itself could have enforced payment, without regard to the necessity for its collection, to satisfy the debts of the bank. And so the Court held that the Statute of Limitations began to run against the bank and its creditors, in favor of the stockholder, when the bank stopped payment.

* * * * * * * *

"But in the present case, as we have seen, as between the Company and its stockholders there was no obligation on the part of the latter to pay the residue of their stock, unless it became necessary to satisfy creditors. We think, therefore, we are safe in saying that the statute did not begin to run in favor of the stockholders until at the very least the neces-

sity for the payment had been ascertained, and an authorized demand of payment made.

"It is said by defendant in error, that to hold that the suit to recover the sums due on the stock held by him is not barred, would defeat the policy of the Bankrupt Act, which is a speedy settlement of the bankrupt's estate, and the equitable distribution of his assets among the creditors.

"Unquestionably a prompt administration of the bankrupt's assets was one of the ends which the Bankrupt Act had in view; but this policy must be held to be subordinate to a just regard for the rights of both the creditors and debtors of the bankrupt estate. The debtor cannot be forced to pay before his contract requires it, merely because the assignee may be in haste to close up the estate. If his obligation were evidenced by a promissory note due at a future day he could not be compelled to pay it before maturity in order that the bankrupt estate might be speedily settled. So if some act must be done by the assignee, such as a demand of payment before his liability is fixed, he cannot be compelled to pay until the prerequisites have been performed. In short, until an unconditional liability to pay something is fastened on the debtor, no action can be maintained against him, and the Statute of Limitations does not begin to run in his favor. The suggestion that the assignee may postpone indefinitely the necessary steps to fix the liability of the debtor and thus defeat the policy of the law, does not answer the proposition that the debtor cannot be sued until a cause of action has accrued against him. It is presumed that the assignee will do his duty. If he fails to do it, he is subject to the order of the bankruptcy Court, which, at the instance of those interested, can compel him to act."

That there is a conflict in the opinions on this subject in the United States shows by reference to the case of KAYE v. METZ (Cal. Sup. Ct.), 198 Pac. 1047; 47 A. B. R. 163. In that case there was a plenary action brought by a

trustee in bankruptcy in a State Court upon an assessment levied by a Referee in Bankruptcy against stockholders of a bankrupt corporation to recover the balance due on capital stock. The bankruptcy Court, on petition duly filed, had ordered the trustee to call in the entire assessment if necessary for the payment of debts.

This order was made after a contest in the bankruptcy Court. In the State Court the defendants contended the action was barred by the Statute of Limitations. The trial Court found in favor of the trustee-plaintiff and gave judgment accordingly. On appeal, the judgment of the lower Court was affirmed. In its opinion the Supreme Court says:

> "The appellants contend that the action is barred by Section 339 of the Code of Civil Procedure, the two year Statute of Limitations. Appellant's theory is that the cause of action accrued and the period of limitation began to run as soon as the corporation was adjudged a bankrupt, if not before. The adjudication occurred more than two years before the action was begun. This proposition is settled against the appellants by the decision in Union Savings Bank v. Leiter, 145 Cal. 696, 79 Pac. 441. In that case the bank had been adjudged insolvent under the Bankruptcy Act of 1878, as amended in 1887 and 1895 (Stats. 1895, p. 172), and, as provided in that act, the directors proceeded to settle its affairs. The proceedings under the Act, was, in effect, a proceeding in insolvency, and the result was that ordinary actions could not thereafter be maintained against the bank, except as provided in the Act. It was in legal effect the same as an adjudication in bankruptcy. People v. Superior Court, 100 Cal. 105; 34 Pac. 492; Long v. Superior Court, 102 Cal. 457, 36 Pac. 807; Crane v. Pacific Bank, 106 Cal. 69; 39 Pac. 215; 27 L. R. A. 562; Argue v. Union Savings Bank, 133 Cal. 139; 65 Pac. 307. The directors, in pursuance of their duties under the Act, made a call for payment upon the stock subscriptions for the purpose of obtaining funds to pay the corporate debts.

Upon the failure of Leiter to pay the amount called the action was begun. It was held (145 Cal. 705; 79 Pac. 441) that the Statute of Limitations did not begin or run against such action at the time of the adjudication that the bank was insolvent, nor until such time as directors, acting as trustees in liquidation under the Act, had duly made a call for payment by stockholders upon their subscription liability and that the action was not barred until two years from the time of making such call. This case cannot be distinguished from the case at bar. In the present case the call for the enforcement of which this action was begun was made by the trustee in bankruptcy under the directions of the Court less than two years prior to the filing of the complaint. Consequently, it is not barred."

The proceedings in the Bankruptcy Court were between the same parties and upon the same subject matter as they were in the Court of Common Pleas and the Supreme Court of the Commonwealth of Pennsylvania. The respondent urged the same defenses to the assessment that he did to the plenary suit. The questions raised by these defenses were resolved against him by the Referee in Bankruptcy, the United States District Court, and the United States Circuit Court of Appeals. In the Court of Common Pleas he raised the additional defense of the plea of the bar of the Statute of Limitations. Those Courts swept aside all of the defenses, as did the United States Courts, with the exception of the plea of the bar of the Statute of Limitations. Therefore, the only question in the case at bar is whether the State Courts could go behind a decree of the United States Court as the basis of an action and establish a different time for the running of the Statute of Limitations, or whether the Statute ran from the time of the entry of the final decree. The trustee-petitioner contends that when, by the decree of the Circuit Court of Appeals, he was relegated to a plenary suit at law, the only defenses available to the respondent were, want of jurisdiction in the Court to make the order, pay-

ment, or the plea of the bar of the Statute of Limitations from the date of the decree.

If this judgment of the Supreme Court of the Commonwealth of Pennsylvania is permitted to stand, not only is there a conflict of opinions on this question in the United States in the administration of bankruptcy, but it is contrary to the law laid down by this Court in SCOVILL v. THAYER, *supra*, and it would tend to render proceedings in bankruptcy, insofar as this class of cases is concerned, futile, because of the delays incident to the administration of a complicated estate in bankruptcy, and in addition it would permit the person proceeded against to cause delay by appeals, as this respondent did, and take advantage thereof. Attention of the Court is called to the fact, and stressed strongly, that the action brought was solely upon the decree of the United States Court, and the State Courts, by their action, have decided that the action should have been brought upon the respondent's original obligation to pay. The Statute of Limitations of Pennsylvania is as follows (Act of March 27, 1713; 1 Sm. L. 76, par. 1):

> "All actions of trespass *quare clausum fredit*, all actions of detinue, trover and replevin, for taking away goods and cattle, all actions upon account and upon the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants), all actions of debt grounded upon any lending, or contract without specialty, all actions of debt, for arrearages of rent, except the proprietaries' quit-rents, and all actions of trespass, of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the five and twentieth day of April, which shall be in the year of our Lord one thousand seven hundred and thirteen, shall be commended and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue and replevin, for goods or cattle,

and the said actions of trespass *quare clausum fregit* within three years after the said five and twentieth day of April next, or within six years next after the cause of such actions or suit, and not after."

It will be noted from a reading of the statute that it runs from the cause of action as laid. The State Courts fell into error by refusing to recognize the real cause of action, the decree of the Federal Court.

The trustee-petitioner contends that before suit could be brought against the respondent, there had to be some order of a Court of competent jurisdiction. As laid down in SCOVILL v. THAYER, 105 U. S. 143, 156, and HARRIGAN v. BERGDOLL, 263 Fed. 279, 281, it was the duty of the trustee-petitioner, in dealing with assets, to proceed under the direction of the Bankruptcy Court. In HARRIGAN v. BERGDOLL, 263 Fed. 279, 281, the United States Circuit Court of Appeals for the Third Circuit, in an opinion by Haight, Circuit Judge, laid down the rule as follows:

> "There are two entirely separate and distinct branches of the proceedings to compel the payment by a stockholder of a bankrupt corporation of any moneys due on his stock, viz.: First, a determination by the Court as to whether it is necessary to assess such stock for the purpose of paying the debts of the bankrupt and the necessary costs of administration, and, if so, then the fixing of the rate of the assessment and the levying of the same upon whatever stock may appear *prima facie* to be subject thereto; and, second, if a stockholder disputes his individual liability as *prima facie* determined, then the institution by the trustee of an appropriate suit or proceeding to fix definitely his liability or non-liability for the assessment and the amount thereof. The first branch is purely administrative and is binding upon any stockholder in any subsequent proceedings instituted to fix his personal liability; but in respect to the second branch the stockholder may make any defense which

may effect his individual liability, other than the correctness of the administrative order. In re Newfoundland Syndicate, 201 Fed. 917; 120 C. C. A. 225 (C. C. A., 3rd Cir.); in re M. Stipp Const. Co., 221 Fed. 372; 137 C. C. A. 180 (C. C. A. 3rd Cir.)."

The trustee-petitioner, under the rules laid down by these two decisions and numerous others by the United States Courts, could not have maintained a plenary action against the respondent until he had obtained the order for assessment as he did. Being a trustee in a Federal bankruptcy proceeding, the proceedings he took and the order he obtained were a right given to, and exercised by him under the authority of a Federal Statute, and he contends that his cause of action arose when he obtained this final order of the Circuit Court. In the case of GREAT WESTERN TELEGRAPH CO. v. BENNHAM, 162 U. S. 329, where the Illinois State Court ordered an assessment on corporate stock, and this order was attempted to be enforced against the defendant in the Iowa State Court, who pleaded the bar of the Iowa State Statute of Limitations, the United States Supreme Court ruled that limitation of actions is governed by the *lex fori*, and is controlled by the legislation of the State in which action is brought as construed by the highest Court of that State, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions; and that the time when a cause of action accrues under a State Statute is not a Federal question, but is a local question, on which the decisions of State Courts cannot be reviewed by the Supreme Court of the United States. But there is a great distinction between that case and the instant case. Here we have a *Federal* bankruptcy, ruled by the Federal Statutes and decisions thereon, and the decision of the Pennsylvania Supreme Court was a discrimination against a right asserted under the laws of the United States; whereas, in the case cited *supra*, the assessment was made by the Court of one state and attempted to be enforced in the Court of another state.

What petitioner emphasizes is that, under the facts of the present case, the cause of action against Bergdoll could not have been enforced by the bankrupt corporation.

This, it is submitted, is expressly ruled in SCOVILL v. THAYER, *supra*, and is also similarly ruled and thoroughly discussed in the case of PARSONS v. HAYES, 14 Abbotts New Cases (N. Y.) 419, where the corporation issued $2,000,000 of full paid stock for property rightly valued at $150,000, and suit was brought by subsequent *bona fide* purchasers of the stock against the trustees who were parties to the fraudulent issue. The Court there explained that the corporation had not been damaged inasmuch as, even if the correct amount of full paid stock had been issued, the corporation would not have had more than $150,000 worth of property, and in addition, that since corporations must act through natural persons, the acts of the trustees were acts of the corporation and the corporation being a party to the contract of issue, although fraudulent as to creditors, would be estopped from avoiding its contract, and that the particular plaintiffs having sued on behalf of all stockholders were acting in place of the corporation, and since the corporation could not maintain the suit in its own name, the Court denied recovery to the plaintiffs.

The Pennsylvania Court, in the instant case, has laid down a general rule of law that where a stockholder and corporation have entered into a contract, fraudulent as to creditors but absolutely binding on themselves, whereby the stockholder receives an amount of full paid and non-assessable stock disproportionately larger than the fair value of property turned over, the Statute of Limitations on this secret transaction begins to run against innocent creditors who can act only by Court order, from the time of adjudication of insolvency.

This Court, starting with SWIFT v. TYSON, 16 Pet. 1, has held that the 34th Section of the Judiciary Act of 1789, Chapter 20, providing "that the laws of the several states except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law,

in the Courts of the United States, in cases where they apply (Revised Statutes, Par. 721) * * *;" this section, upon its true intendment and construction, is strictly limited to local statutes, and local usages of the character bebefore stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."

It is to be observed that the Statute of Limitations relied on by the Pennsylvania Court does not attempt to define the time when the causes of action therein enumerated shall arise. Therefore, this Court is not now concerned with the construction of a State Statute but with the antecedent general question of when a cause of action arose in a proceeding under the Bankruptcy Act upon which the State Statute afterwards operated.

The question for the Court's determination was, what was the cause of action and when did it arise? It is clear that it arose in bankruptcy, and whether the cause of action arose at the date of insolvency or the date of the decree is purely a Federal question, and not for the State Court to determine.

We quote the following cases of this Court affirming the principle laid down in SWIFT v. TYSON.

In OLCOTT v. SUPERVISORS, 16 Wall. 678, it was held:

> "The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no State Court can conclusively determine for this Court."

IN RAILROAD v. LOCKWOOD, 17 Wall 357, where the question was whether a common carrier could relieve itself by contract from negligence, this Court said:

> "But on a question of general commercial law, the Federal Courts administering justice in New York have equal and coordinate jurisdiction with the Courts

of that State; and in deciding a case which involves a question of such importance to the whole country; a question on which the Courts of New York has expressed such diverse views, and have so recently and with such slight preponderancy of judicial suffrage, come to the conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law."

In BOYCE v. TABB, 18 Wall. 548, recovery was had on a promissory note, the consideration of which was the price of slaves. Slavery existed when the note was delivered but had been abolished when payable and the State Court by decision of its highest tribunal had refused recovery in such cases on ground of public policy. This Court, citing SWIFT v. TYSON, disregarded the local decision and affirmed the recovery allowed in the Circuit Court.

To the same effect, see

OATES v. NATIONAL BANK, 100 Otto 239;
COUNTY OF PRESIDIO v. NOEL-YOUNG, *et al.*, 212 E. S. 58.

Reaffirming SCOVILL v. THAYER, *supra*, the Court is asked to say, as a general rule of law in cases such as this, that the true cause of action is the decree obtained under the Federal Bankruptcy Law, and that no State Statute of Limitations begins to run against such a decree until the date it becomes final; this, to the end that there shall be a uniform administration in Federal Bankruptcy throughout the country.

It is respectfully submitted that the trustee-petitioner, having proceeded and obtained, under a Federal Statute, a right of action, and having been erroneously denied his

rights on that cause of action, the judgment of the Supreme Court of the Commonwealth of Pennsylvania should be reversed with directions to that Court to reverse the judgment of the Court of Common Pleas No. 4, of Philadelphia County, with instructions to enter judgment on the verdict in favor of the trustee-petitioner and against the respondent, for the sum of $192,909.24 with interest thereon from February 15, 1923.

FRANK A. HARRIGAN,
JOSEPH W. CATHARINE,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1925. No. 161.

FRANK A. HAMMAN, Trustee of the Bankrupt Estate of the LOUIS J. BERGDOLL MOTOR COMPANY,

Petitioner,

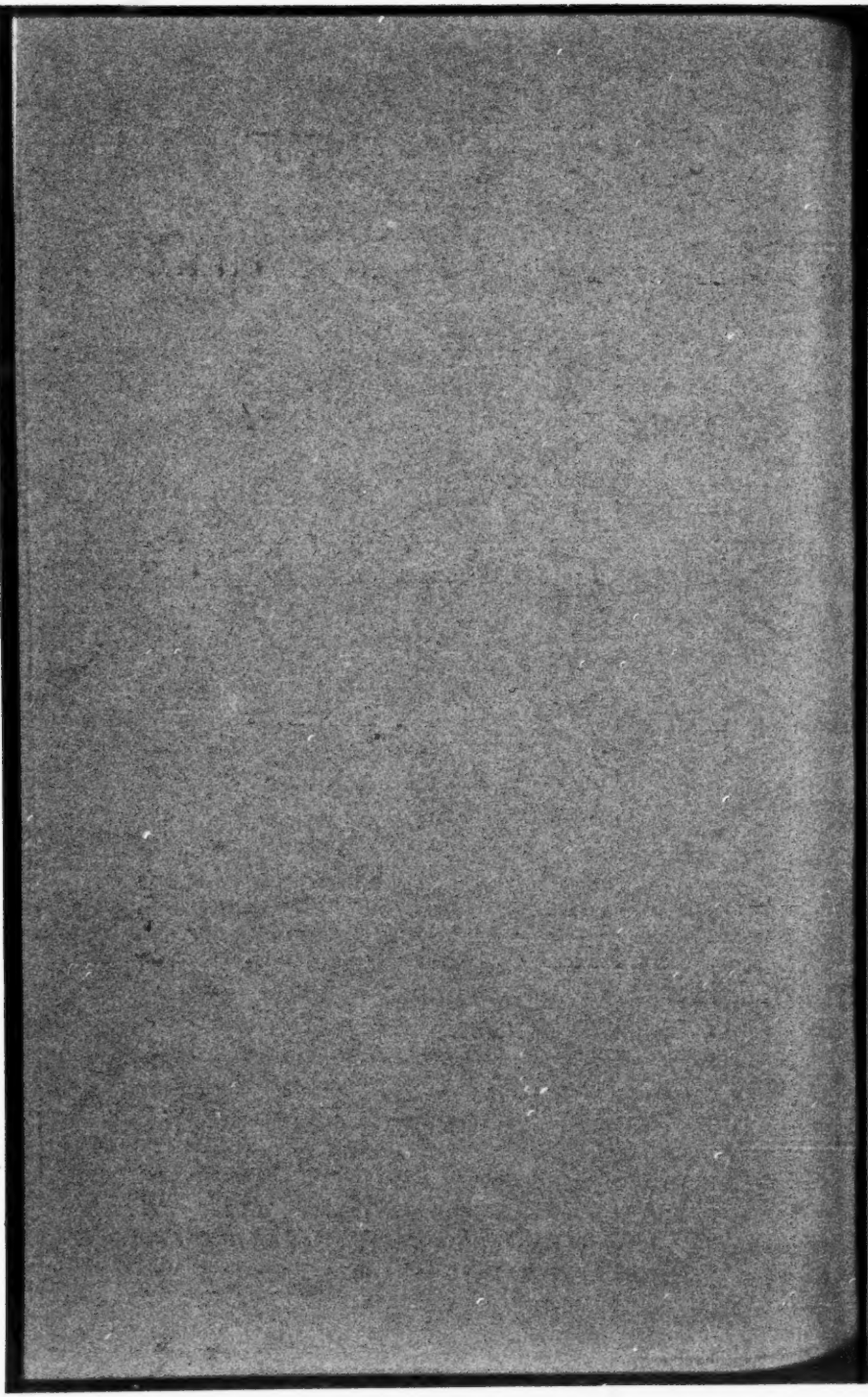
vs.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGDOLL,

Respondent.

REPLY TO RESPONDENT'S BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925. No. 181.

FRANK A. HARRIGAN, Trustee of the Bankrupt Estate of the LOUIS J. BERGDOLL MOTOR COMPANY,
Petitioner,

v.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON,
Respondent.

REPLY TO RESPONDENT'S BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

The respondent is confused as to the real question in issue. The proposition, re-stated, is as follows: That where a Federal court establishes a right of action for a trustee in Bankruptcy under the Bankruptcy law, which right of action must be enforced in a State court by suit, the State court is without power to go behind the decree giving such right, as established by the Federal court, and say that the trustee's cause of action arose at a different time.

The argument of the respondent (Brief, 7-8-9-10) is given over to a discussion of the power of this court to review a decision of the State court. With the proposition therein advanced the petitioner largely agrees, but the cases therein cited are all distinguishable from the case at

bar and the Federal question involved in the instant ca arises from the fact that the State courts of Pennsylvani refused to recognize the cause of action established by t Federal courts for the Eastern District of Pennsylvani under the Bankruptcy law, giving the trustee the right sue. Indeed, until he had that power and authority co ferred on him in Bankruptcy he had no right nor cause action whatever, and the petitioner asserts that the deni of his right, as established by the Federal law, was such denial of a right under a Federal statute as gives this cou jurisdiction. And, furthermore, the action of the Stat courts rendered the proceedings in Bankruptcy, to the en of collecting on this stock liability, futile and of no effect.

That the action at bar was brought upon the decree o the United States Court is clearly set out by the declaratio or statement of claim filed originally in the Court of Com mon Pleas No. 4 of Philadelphia County (R. 2), thus show ing that there was no other right of any kind in the peti tioner-trustee. On page 10 of respondent's brief it is state that the action is on the contract, not on the assessmen proceedings. This is without warrant because, at the tim of Bankruptcy, there was no obligation on the part of Berg doll to pay the corporation anything. So far as it and h were concerned, he owed it nothing. It was only when i was discovered in the course of Bankruptcy proceeding that he had paid but $144,428.03 for his stock instead o $300,000.00, and that there was not enough to pay creditors that he was obligated to pay anything. His liability i created by law and not by any contract between him an the corporation. This is the rule laid down by your Honor able Court in Scovill v. Thayer, 105 U. S. 143.

On pages 11-12-13 of respondent's brief, it is state that the proceedings to assess were unnecessary. This ma be true in many cases; but in a Federal Bankruptcy pro ceeding, as set forth in Scovill v. Thayer, supra, no suit may be brought by a trustee in bankruptcy, under circum

stances as stated therein which are identical with the present case, *until there is an authorized demand or an order of the court.* And again, it is a safer practice, before suits are brought by trustees in Bankruptcy, to notify all creditors and have the authority of the judicial officer before taking proceedings which will necessarily call for the expenditure of the moneys of the bankrupt estate.

The proceedings to fix the respondent's liability were brought only when everything else in the Bankruptcy matter had been closed, all the claims reduced, and all other assets collected. From then on he vigorously resisted the right to an assessment and the right of the trustee to a summary order to pay, both of which orders were finally entered by the Referee. Had any one of the defenses raised by him to these proceedings been successful at any time in the United States Courts, the matter would have been finally ended and no plenary suit would have been necessary; and had the Circuit Court of Appeals finally sustained the trustee in bankruptcy as to the summary order to pay, Bergdoll's liability would have been fixed and the entire matter ended. Certainly, the trustee could not have sued while these proceedings were pending, and the appeals taken by Bergdoll delayed the suit at least two years and five months. That he should have advantage of this is unthinkable.

At page 17 of respondent's brief he states that the determination of the time when the action accrued was a question of local law. The trustee-petitioner asserts that this suit, having been brought upon a decree of the United States Court establishing a cause of action between the same parties, the State court was not concerned with anything behind that date; and that it was without power to say, after the decree of the Federal court, that the right of action in the petitioner began at a time long antecedent. There is no question in this case on the part of the petitioner on the wrongful application of the State statute of limitations. The single question is as in Scovill v. Thayer, supra: When did the right of action accrue? This having been

established by the Federal court, the statute began to run from that time.

At page 21 of respondent's brief it is stated there was no basis for the verdict, and refers particularly to the amount. It appeared from the books of the corporation that for $300,000.00 worth of stock the respondent turned over assets amounting to $144,428.03, this being the value placed upon the assets by himself at the time. A better standard for fixing the deficiency than the difference between this amount and $300,000.00 it is hard to see (R. 23).

At pages 22-23 of respondent's brief he attempts to show that the matter was *res adjudicata*. This is without any basis in fact. The facts are, that early in the proceedings Bergdoll presented a claim against the bankrupt estate for $395,860.00, alleging that the present bankrupt was indebted to him in that amount (R. 81). The petitioner-trustee filed an answer, alleging that (1) $300,000.00 of said amount was contributed to the capital stock of the Louis J. Bergdoll Motor Company of New Jersey; that (2) certain items of said claim were paid by merchandise; and (3) that $70,000.00 was in exchange for a check. The Referee in Bankruptcy in an opinion (R. 83 to 95) found (R. 93) that the $300,000.00 was contribution to capital stock and not a debt. He reduced the claim of $395,860.00 to $10,000.00, and the date of the finding was January 7, 1915, early in the proceedings and two years before the petition to assess the respondent was filed, to wit: October 22, 1917. There was never any question raised in the proceedings before the latter date as to the liability of the respondent to pay. It was mere dicta on the part of the Referee that the stock of the Pennsylvania corporation which took over the New Jersey company's assets was fully paid. This same question of *res adjudicata* was raised by the respondent before the Referee in Bankruptcy, the United States District Court on petition to revise, the Circuit Court of Appeals on review, and the Court of Common Pleas No. 4

of Philadelphia at the time of the trial, all of which tribunals decided that it was without merit and did not enter into the case. The point adjudged in the Referee's opinion the respondent refers to was whether his claim of $395,860.00 was made up largely of money loaned or contributions to capital stock, and the Referee found the latter. On this subject of *res adjudicata* your Honorable Court has expressed itself in North Carolina R. Co. v. Story, 45 S. Ct. page 533, Advance Sheets No. 16, June 15, 1925:

> "It is well settled that the principle of res adjudicata is only applicable to the point adjudged and not to points only collaterally under consideration, or incidentally under cognizance or only to be inferred by arguing from the decree. Hopkins v. Lee, 6 Wheat. 109, 114, 5 L. Ed. 218; Norton v. Larney, 266 U. S. 511, 517, 45 S. Ct. 145, 69 L. Ed.—. The reasoning and opinion of the court are not res adjudicata unless the subject-matter in issue be definitely disposed of by the decree. Keane v. Fisher, 10 La. Ann. 261; Bridges v. McAlister, 106 Ky. 791, 51 S. W. 603, 45 L. R. A. 800, 90 Am. St. Rep. 267; Probate Court v. Williams, 30 R. I. 144, 73 A. 382, 19 Ann. Cas. 554; Scottish-American Mortgage Company v. Bunckley, 88 Miss. 641, 41 So. 502, 117 Am. St. Rep. 763; Braun v. Wisconsin Rendering Company, 92 Wis. 245, 66 N. W. 196; Citizens' Bank of Emporia v. Brigham, 61 Kan. 727, 60 P. 754."

The petitioner never took the position that the contribution to capital stock of the New Jersey company paid up the stock of the respondent's Pennsylvania company. His position always was that the only consideration received by the Pennsylvania company from the respondent was assets of the New Jersey company amounting to $144,428.03 and that this was clearly insufficient, and that therefore he was liable to pay to the trustee the difference for the benefit of creditors.

Statutes of Limitation are made to protect people from stale demands. The suit in the State court was between the same parties and involved the same subject matter as the proceedings in the United States court in Bankruptcy. All these proceedings were had to the end that the respondent might be compelled to pay the creditors of the corporation; and step by step, in accordance with the law and the Rules of court, this was done. Each step was resisted vigorously by the respondent. He knew everything about the proceedings in Bankruptcy and the proceeding in the State court, from the start to the finish.

It is respectfully suggested that there could be no safer practice established in Bankruptcy for suits of this kind than laid down by the Court in Scovill v. Thayer, supra, and that by the reversal of this decree there will be a reaffirmation of the principles therein contained.

Respectfully submitted,

FRANK A. HARRIGAN,
JOSEPH W. CATHARINE,
Attorneys for Petitioner.

OCT 13 1924

WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1924 [redacted] 181

FRANK A. HARRIGAN, Trustee of the bankrupt estate of THE LOUIS J. BERGDOLL MOTOR COMPANY, a corporation organized under the laws of the State of Pennsylvania,

Petitioner,

vs.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON,

Respondent.

RESPONDENT'S BRIEF CONTRA APPLICATION FOR WRIT OF CERTIORARI.

HARRY C. KOHLHAS, JR.,
WALTER S. GIBSONS,
Attorneys for Respondent.

Martin & Lyle, 618 Penfield Bldg., Phila., Wal. 0057, Keystn. Race 0057.

IN THE

Supreme Court of the United States

October Term, 1924. No 668.

FRANK A. HARRIGAN, Trustee of the bankrupt estate of THE LOUIS J. BERGDOLL MOTOR COMPANY, a corporation organized under the laws of the State of Pennsylvania,

Petitioner,

vs.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON,

Respondent.

RESPONDENT'S BRIEF CONTRA APPLICATION FOR WRIT OF CERTIORARI.

No Federal Question is Involved in the Decision of the Court Below.

The sole question raised by the petitioner in the Supreme Court of Pennsylvania and the only point involved in the decision of that Court is the construction of the Statute of Limitations of that State, in actions of debt, with particular reference to the time when the period of limitation begins to run. The pe-

titioner does not state in the petition filed upon what theory he contends that this Court has a right to review the decision of the Court below, nor does he indicate what provision of Section 709 of the Revised Statutes, as amended by the Act of 1875, could give this Court such authority. The nearest approach to a federal question in this case suggested by the petitioner is his present contention that as a trustee in bankruptcy the Statute of Limitations of the State of Pennsylvania and the decisions of the Supreme Court of that State are not binding upon him.

Before considering this contention, it is necessary to make a brief statement of the principal facts disclosed by the record as some of the statements contained in the petition and some of the assumptions underlying the petitioner's version of the questions involved are not supported by the record.

The respondent subscribed for 3,000 shares of the common capital stock of the Louis J. Bergdoll Motor Company, a corporation of the State of Pennsylvania (now bankrupt), in March, 1912, and in payment of this subscription transferred the entire capital stock (which was owned by him) in a New Jersey corporation of the same name, and with this transfer of stock there was transferred to the bankrupt all of the assets of the New Jersey corporation. Prior to this transfer the respondent had paid into the treasury of the New Jersey corporation more than $300,000 in cash. On January 8th, 1913, the respondent assigned his stock to others. On April 11, 1913, the corporation was adjudicated bankrupt upon default of an answer being filed to a creditors' petition and Frank A. Harrigan, Esq., who had been appointed receiver was thereafter elected Trustee.

The claims of creditors filed against the bankrupt estate greatly exceeded the assets of the bankrupt

coming into the hands of the trustee and it was at once apparent to all concerned that there would be a substantial deficit, even though the estate should succeed in certain litigation and in defeating certain contested claims. All of this litigation terminated favorably for the bankrupt estate.

No assessment upon the stock of the bankrupt company was ever made by the bankrupt company or its directors, or by any other authority, nor did the trustee in bankruptcy take any steps to cause any assessment to be made until he filed his petition for an assessment on October 22, 1917, which was a period of four years and six months after the adjudication of bankruptcy, notwithstanding the fact that during that time it was well known to the trustee that the assets of the bankrupt estate would not be sufficient to pay the claims of creditors.

The respondent was a creditor of the bankrupt at the time the petition for assessment was filed and as a creditor of the bankrupt he exercised his legal right to contest the advisability of the assessment proceedings. The referee, however, upheld the propriety of the assessment and then at the instance of the petitioner made an order specifically decreeing that Louis J. Bergdoll (this respondent) be assessed for 51.85% of the par value of 3,000 shares of capital stock of the company and specified that such assessment amounted to $155,571.97, with interest thereon from April 1, 1912 (the date the stock was issued) and further ordered that respondent pay to the trustee, petitioner, the said amount with interest from April 1, 1912, to wit, the sum of $219,771.34. The petitioner was seeking in summary proceeding to accomplish results which could only be secured in a plenary proceeding in the proper court and an appeal was taken to the United States District Court and from thence

to the Circuit Court of Appeals and before the last-named tribunal the decree of the District Court was reversed in so far as it fixed the personal liability of this respondent and in so far as it fixed the amount of the assessment, but affirmed the decree in so far as it adjudicated the necessity for an assessment on the stock of the bankrupt, the rate thereof and those who appeared *prima facie* subject to the assessment.

The mandate was issued on the 27th day of March, 1920, and the present suit was not entered until the 13th day of July, 1921, a period of eight years and three months after the adjudication of bankruptcy. At the trial of the cause a verdict was rendered for the petitioner, but the Court of trial subsequently entered judgment for the respondent, holding that the claim was barred by the Statute of Limitations, which decision was sustained by the Supreme Court of Pennsylvania upon that ground.

The general Statute of Limitations of the State of Pennsylvania, to wit, the Act of March 27, 1713, Section 11, Smith's Laws 76, provides that:

> "* * * all actions of debt founded upon any lending or contracting without specialty * * * shall be commenced and sued within the time and limitation hereinafter expressed and not after, that is to say * * * debt * * * within six years next after the cause of such action or suit and not after * * *."

Construing this Statute, the Supreme Court of Pennsylvania has uniformly ruled that the right of action by the creditors for unpaid subscriptions to stock of a corporation accrues and the limitation begins to run from the date of insolvency.

See

SWEARINGEN vs. DAIRY CO., 198 Pa. 68 (1901);
NEWTON'S ESTATE, 46 Pa. Super. Ct. 40 (1911).

The Court below so ruled in this case and this ruling is the cause of petitioner's complaint here.

Petitioner does not challenge the validity of the above Statute of Limitations on the theory that it is repugnant to the Constitution of the United States, which would be the only basis for this Court to take jurisdiction of this case. Yet the decision asked to be reviewed is the decision that the Statute of Limitations began to run from the date of insolvency which was judicially declared by the United States District Court to be April 11, 1913.

Petitioner cites the case of RECTOR vs. CITY DEPOSIT BANK COMPANY, 200 U. S. 405, in support of his contention that this Court should review the proceedings in the Supreme Court of Pennsylvania on the theory that the peitioner is a trustee in bankruptcy appointed under the bankruptcy laws of the United States, seeking to recover what was asserted to be an asset of the bankrupt estate under that law. In the case cited, this Court held that a federal question was raised under the bankrupt law, which was sufficient to support a writ of error to a State Court where the judgment of the State Court was against the trustee in bankruptcy in an action to recover property from a creditor on the ground of a fraudulent preference. That was a right under the federal bankrupt law which was denied by the State Court, but in the instant case no right under any federal statute has been denied the petitioner. The right to recover

the unpaid balance upon a stock subscription is under the general law of the State of Pennsylvania and as such is not reviewable by this Court.

> Gibson vs. Chouteau, 13 Wall. 92;
> The Winnebago, 205 U. S. 354.

In the case of "THE WINNEBAGO", last cited, this Court held that the decision by a State Court upon a statute of limitations is conclusive. In the opinion by Mr. Justice Day dismissing a writ of error to the Supreme Court of the State of Michigan, it is said:

> "Several objections are urged by the plaintiff in error which, if sustained, will result in the reversal of the judgment of the Supreme Court of Michigan. Some of them are of a non-Federal character. It is insisted that the statute does not apply in this case, because the steamer Winnebago was not to be used in navigating the waters of Michigan, within the terms of the statute. But this only presents a question of state law, upon which the judgment of the state court is final and conclusive. The same may be said as to the objection because the transportation company was a bona fide purchaser without notice of complainant's lien, and because complainant did not within a year file its claim for a lien with the proper court in the county in which it resided. These are state questions, likewise concluded by the decision of the state court."

It is submitted, therefore, that no federal question is involved in the decision of the Court below either in construing its statute of limitations or in declaring the general law with respect to unpaid stock subscriptions, which is reviewable by the Supreme Court of the United States.

THE FACT THAT THE DECISION OF THE COURT BELOW DOES NOT FOLLOW A RULE OF THE GENERAL LAW LAID DOWN BY THE SUPREME COURT OF THE UNITED STATES IN ANOTHER CASE DOES NOT PRESENT A QUESTION REVIEWABLE BY THIS COURT.

Petitioner complains that he was misled by the decision of this Court in the case of Scoville vs. Thayer, 105 U. S. 143, and that therefore the Court below erred in denying him the right to proceed after the time within which to bring such a suit had expired under the local statute of limitations. The case of Scoville vs. Thayer does not bear out the petitioner's contention. In that case it was necessary to have an assessment before suit could be brought and it was also necessary that certain litigation be terminated before the necessity for an assessment could be ascertained. Further than this, proceedings in that case were carried on with due diligence in a federal court. In the instant case petitioner, without any reason, delayed the filing of his petition for four and a half years after his appointment and then delayed nearly four years more before instituting suit, although under the Pennsylvania law there was no necessity for the assessment proceedings prior to the institution of suit.

See

Citizens & Miners Savings Bank vs. Gillespie, 115 Pa. 564.

This rule of the State of Pennsylvania was recognized and affirmed by this Court in Potts vs. Wallace, 146 U. S. 689.

But, even though the decisions in the federal courts sustained the contention of the petitioner, this court

has held that the refusal of the state courts to follow a rule of general law laid down by this Court in other cases does not present a question reviewable by this Court. Thus, in the case of Pennsylvania Railroad Co. vs. Hughes, 191 U. S. 477, this Court, in affirming the judgment of the Supreme Court of Pennsylvania in declining to follow the rule laid down by the Federal Courts in reference to the liability of the common carriers, held that the Supreme Court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amenable to review in the Federal Supreme Court where some, right, title, immunity, or privilege, the creation of the federal power, has been asserted and denied.

The petitioner contends that his action in attempting to collect this claim in the summary proceeding before a referee, which action was held by the Circuit Court of Appeals to be illegal, excuses him for his failure to institute suit within the period prescribed by the Statute of Limitations of the State of Pennsylvania. It is submitted that the doing of a useless thing which does not constitute the institution of suit can neither have any bearing upon the time when the Statute of Limitations begins to run nor can it stop the running of the statute. The decision of the Supreme Court of Pennsylvania, however, we submit, is conclusive as to these questions.

It is therefore respectfully submitted that the application for writ of certiorari to your Honorable Court should be denied.

HARRY C. KOHLHAS, JR.,
WALTER B. GIBBONS,
Attorneys for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1925. No. 181.

FRANK A. HARRIGAN, Trustee of the Bankrupt Estate of the LOUIS J. BERGDOLL MOTOR COMPANY,

Petitioner,

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Respondent.

RESPONDENT'S BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

HARRY C. KOHLHAS, JR.,
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OCTOBER TERM, 1925. No. 181.

FRANK A. HARRIGAN, Trustee of the Bankrupt Estate of the LOUIS J. BERGDOLL MOTOR COMPANY,
Petitioner,

vs.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON,
Respondent.

RESPONDENT'S BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

This case was decided by the Supreme Court of Pennsylvania and the Opinion is reported as HARRIGAN, TRUSTEE, APPELLANT v. BERGDOLL, 281 Pa. 186, at page 187.

The final judgment, dated February 13th, 1924 (R. 130), was entered in the Court of Common Pleas No. 4 of Philadelphia County and was affirmed by the Supreme Court of Pennsylvania in an Opinion filed July 8th, 1924 (R. 128).

The Petitioner sued to recover an alleged unpaid balance due upon a stock subscription. Suit was brought in the State Court of the State of Pennsylvania where the corporation was domiciled and where the parties to the

proceedings resided (R. 2) and where the contract was entered into.

The corporation was adjudicated bankrupt on April 11th, 1913 (R. 56) and the suit was instituted July 13th, 1921 (R. 1). The Pennsylvania courts ruled that the Statute of Limitations of the State of Pennsylvania was applicable to this suit; that the right of action, if any, accrued at the time of the adjudication in bankruptcy and that the suit not having been brought until more than six years after the cause of action arose is barred by the Pennsylvania Statute of Limitations (R. 125 and 128).

The Petitioner now contends in his brief that as he is a Trustee in bankruptcy the Statute of Limitations of the State of Pennsylvania is not applicable to the case at bar, but does not set forth any citation from the Record showing that he made such contention in the Supreme Court of the State of Pennsylvania or in the lower court. His sole contention there was that the Statute of Limitations of the State of Pennsylvania did not begin to run until the date of the final judgment of the United States Circuit Court of Appeals sustaining the Referee's order for an assessment (R. 129). The Supreme Court of the State of Pennsylvania ruled that the right of action, if any, accrued at the time the company was adjudicated a bankrupt and the estate was found to be insolvent, viz: April 11th, 1913 (R. 129 and 130).

The petitioner contends that under paragraph 237 of the Judicial Code, this Court has jurisdiction to review the final judgment of the Supreme Court of Pennsylvania on the ground that a Federal question is presented merely because he is a trustee in bankruptcy seeking to recover an asset of the bankrupt estate, and cites the cases of RECTOR, TRUSTEE v. CITY DEPOSIT COMPANY, 200 U. S. 411 and RECTOR, TRUSTEE v. COMMERCIAL NATIONAL BANK, 200 U. S. 423, as authority therefor. In each of these cases, the Trustee brought suit in a State

Court to recover property of a bankrupt upon the ground of a fraudulent preference. The right of this Court to review the decision in those cases was questioned by the defendants for reason that the Trustee had not expressly declared that he was suing to recover the preference under the Bankruptcy Act and not under the State law. This Court in ruling that there was a presumption that he was proceeding under the National Bankruptcy Act ruled that there was a Federal question thereby presented and the denial of the asserted right was a denial of the right or title specially claimed under a law of the United States (p. 411).

This Court is without authority to review the decisions of the Supreme Court of Pennsylvania in this case, even though the suit is by a Trustee in bankruptcy since the asset herein sought is such that if recoverable at all, was recoverable under the general law of the State of Pennsylvania and not by virtue of a Federal Statute, and this Court has so ruled: McKENNA v. SIMPSON, 129 U. S. 506, 512; THOMPSON v. FAIRBANKS, 196 U. S. 516, 523; CRAMER v. WILSON, 195 U. S. 408, 416.

Statement of the Case.

The following additional statement of facts is deemed necessary to a consideration of the questions involved.

The Petitioner brought suit to recover a stock assessment upon 3,000 shares (par value $100 per share) of the common capital stock of the Louis J. Bergdoll Motor Company, a corporation organized under the laws of the State of Pennsylvania. This suit was brought on July 13th, 1921, eight years and three months after the adjudication in bankruptcy of the company (R. 56). The respondent and his nominees had signed an application for charter for the bankrupt company, which was granted on March 18th, 1912, and there was issued to him and his nominees certificates for 3,000 shares of the common capital stock of the company

(R. 3). In payment for this stock the respondent transferred the entire capital stock of the New Jersey corporation of the same name and with this transfer of stock there was transferred to the Pennsylvania Company (now bankrupt) all of the assets of the New Jersey corporation, subject, however, to all the liabilities of the latter company (R. 35 and 36). No other stock was issued. Prior to this transfer, the respondent had paid into the treasury of the New Jersey corporation considerably more than $300,000 in cash, for which he had received no stock in that company (R. 33).

On January 8th, 1913, the said 3,000 shares of stock of the Pennsylvania corporation were assigned by the respondent to others (R. 4) and on April 11th, 1913, the corporation was adjudicated a bankrupt and the estate was found to be insolvent (R. 129). The claims of creditors filed against the bankrupt estate greatly exceeded the assets of the bankrupt coming into the hands of the Trustee and it was at once apparent to all concerned that there would be a substantial deficit even though the estate should succeed in certain litigation and in defeating certain contested claims (R. 128). All of this litigation terminated favorably for the bankrupt estate.

The respondent was a substantial creditor of the bankrupt and filed a claim for $395,860, which claim was subsequently reduced to $310,000 (R. 81, 82 and 83). This claim was contested by the Trustee, petitioner, who set up by way of defense the subscription of the respondent to the stock of the bankrupt corporation and the Referee thereupon found that the stock of the bankrupt company subscribed for by the defendant became fully paid and disallowed the claim to the extent of $300,000 and allowed the claim for the balance of $10,000 (R. 93 and 94).

No assessment upon the stock of the bankrupt company was ever made prior to the insolvency, nor did the Trustee in bankruptcy take any steps to cause such assessment to

be made until he filed his Petition for Assessment on October 22nd, 1917 (R. 128). When the Trustee filed this Petition for Assessment, the respondent herein as one of the creditors of the estate, believing that the Referee's finding that the stock had been full paid had adjudicated the point, contested the advisability of the assessment proceedings. The Referee, however, found that an assessment was necessary and fixed the rate at 51.85 per cent of the par value. Then at the instance of the Trustee the Referee directed the respondent to pay to the Trustee the sum of $155,571.97, being 51.85 per cent of the par value of 3,000 shares of the capital stock, together with interest from April 1, 1912, the date the certificates were issued and then specified the total amount to be paid was $219,771.34 (R. 54).

The petitioner was thereby seeking in a summary proceeding to accomplish results which could only be secured in a plenary proceeding in a proper court, and an appeal was taken to the United States District Court and from thence to the United States Circuit Court of Appeals and before the last named tribunal the decree of the District Court was reversed insofar as it fixed the personal liability of this respondent and insofar as it fixed the amount of the assessment, but the decree was affirmed insofar as it adjudicated the necessity for the assessment on the stock of the bankrupt, the rate thereof and those who appeared *prima facie* subject to the assessment (R. 16, 17, 18 and 19).

A mandate was issued on the 27th of March, 1920 (R. 55) and the present suit was not entered until the 13th day of July, 1921. The respondent set up a number of defenses on the merits and also pleaded the Statute of Limitations of the State of Pennsylvania.

At the trial of the cause, a verdict was directed for the plaintiff, the trial Judge ruling that there was no question of fact to be submitted to the jury either as to the amount of the assessment or upon the other defenses set up by the respondent; that respondent was concluded by the assess-

ment proceedings in the United States Court, although he offered positive evidence that the stock was full paid and further that the matter was *res adjudicata* (R. 51). Subsequently, upon a motion for judgment *non obstante veredicto,* the Court of trial ruled that the claim was barred by the Statute of Limitations and entered judgment for the defendant (R. 121). Upon appeal, the Supreme Court of Pennsylvania sustained the decision on the ground that the State Statute of Limitations had barred the right of action, if any, and further holding that in view of their decision on this ground it was not necessary to consider the other points of defense to the claim.

ARGUMENT.

Summary.

The decision of the Supreme Court of Pennsylvania in this case does not involve any Federal question. No construction of the Bankruptcy Statute was called into question and no decision was made against any title, right, privilege or immunity claimed under the Constitution of the United States, or any Statute thereof. The point involved in the decision of the Supreme Court of Pennsylvania is stated in their Opinion filed (R. 129), as follows:

> "The sole question for our determination is whether the statute began to run at the time the motor company was adjudicated a bankrupt and the estate found to be insolvent, viz., April 11th, 1913, or whether it did not begin to run until the date of final judgment of the United States Circuit Court of Appeals of March 27th, 1920, sustaining the referee's order for assessment".

No contention was made by the petitioner that the Sta-

tute of Limitations of the State of Pennsylvania was not applicable but he did contend that the right of action did not accrue upon the stock subscription until the assessment was made. The Supreme Court of Pennsylvania held that the right of action accrued in this case at the time the corporation was adjudged a bankrupt on the grounds of insolvency and that no suit having been brought on the said claim within six years thereafter, the right of action was barred.

The time when the right of action accrued to the petitioner and the construction of the Statute of Limitations applicable to such claim were the only points involved in the decision of the Supreme Court of Pennsylvania, and on the authority of the decisions of the Supreme Court of the United States, we respectfully submit that no Federal question reviewable by this Court is presented.

The Power of this Court to Review Decisions of State Courts.

The United States Constitution, after defining the original jurisdiction of the Supreme Court, provides (Article III, Sec. 2, clause 2) that, "in all the other cases before mentioned (i. e., the cases to which the judicial power of the United States extends) the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make" and under this clause it has been held that Congress has power to provide for the review of the decisions of the State courts. See: COHENS v. VIRGINIA, 6 Wheat. 264, 416.

By Section 237 of the Judicial Code (5 Fed. Stat. Ann. 2nd Ed., 723), it is provided as follows:

> "It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought

up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority."

To warrant the exercise by the United States Supreme Court of jurisdiction to review a decision of a State Court, the decision must fall within one of these three categories:

MILL v. BROWN, 16 Pet. 525, 527;
SEVIER v. HASKELL, 14 Wall. 12, 14;
HOME INS. CO. v. AUGUSTA, 93 U. S. 116, 121.

Limitation of the Power to Review Decisions of State Courts.

This Court does not possess the jurisdiction of a general reviewing court of error, but is limited to a consideration of the specific instances of denials of federal rights.

WATERS-PIERCE OIL CO v. TEXAS, 212 U. S. 86, 97.

It is only where the existence or validity of an authority exercised under the law of the United States is denied and the denial forms the subject of direct inquiry, that the validity of such authority is drawn into question. U. S. v. LYNCH, 137 U. S. 280, 286, 287.

No Federal Question Involved in Decision of the Supreme Court of Pennsylvania in this Case.

In this proceeding, in the State court no decision was made against the validity of any Statute of or authority exercised under the United States, or against any title, right, privilege or immunity claimed under the Constitution of the United States, or any Statute thereof. This Court has ruled that it has no jurisdiction to review the judgment of the Supreme Court of the State in such a case as the one at bar: McKENNA v. SIMPSON, 129 U. S. 506, 512.

A Federal Question is Not Presented Merely Because Petitioner is a Trustee in Bankruptcy.

Nor does the Supreme Court of the United States have any jurisdiction to review the decision of a State Court merely because the suit was brought by a Trustee or Assignee in bankruptcy to recover property alleged to belong to the bankrupt estate. Thus in the case of McKENNA v. SIMPSON, supra, it was held that where the assignee in bankruptcy resorted to the State Court to set aside certain conveyances made by the bankrupt alleged to have been made to defraud his creditors and no question was there raised as to the assignee's power under the Act of Congress, or the rights vested in him as assignee, the judgment of the Court sustaining the validity of the conveyance and denying a right of recovery, presented no Federal question so as to give the United States Supreme Court jurisdiction to review the decision of the State court.

In THOMPSON v. FAIRBANKS, 196 U. S. 516, it was held that in an action brought by a Trustee in bankruptcy

in a State court to recover from the bankrupt's mortgagee the proceeds of a sale of mortgaged property, that whether and to what extent a chattel mortgage covering after acquired property is valid is a local question on which the decisions of the State courts will be followed by the Federal Supreme Court in determining whether the taking possession of the mortgaged chattels after condition broken amounted to a preference voidable by mortgagor's trustee in bankruptcy; that the decision of a State court as to whether a conveyance by a bankrupt was made with intent to defraud his creditors does not present a Federal question which can be considered by the Federal Supreme Court on writ of error to a State court.

Action is on the Contract, Not on the Assessment Proceedings.

Petitioner, in his brief, takes the position that his suit was based upon the assessment proceedings and not upon the contract of subscription, express or implied, that the respondent would pay into the treasury of the corporation the value of his stock. We contend that his position is erroneous and that the right to recover the unpaid balance upon a stock subscription is contractual in its nature and is based upon the law of contracts of the domicile of the corporation; which, in the instant case is the State of Pennsylvania where the suit was brought and the parties reside. This principle is stated in 14 Corpus Juris, Sec. 799, p. 535, as follows:

> "Subscriptions to the stock of a corporation are construed and the rights and liabilities of the parties determined according to the law of the domicile of the corporation, it being a reasonable implication that the parties intended to be governed by that law".
> Citing, *inter alia*:

NASHUA SAVINGS BANK v. ANGLO AMERICAN CO., 189 U. S. 221, 230;
PITTSBURGH FIRST NATIONAL BANK v. DARLINGTON, 25 Pa. Super. 438, 440;

to the same effect see:

BALL v. ANDERSON, 196 Pa. 86, 88;
COMMERCIAL NATIONAL BANK v. KIRK, 222 Pa. 567, 570.

The Proceeding to Assess Was an Administrative Order and Not a Judgment.

The proceeding to assess the stock was purely an administrative order and was not a judgment against any of the stockholders in their individual capacity. This point has been decided by the Circuit Court of Appeals in the case of BERGDOLL v. HARRIGAN, 263 Fed. 279, 281.

This Court has also passed upon the point in the case of GREAT WESTERN TELEGRAPH COMPANY v. PURDY, 162 U. S. 329, 336, 337, where the Court said, referring to an order for assessment on the stock of the corporation:

> "The order of that court was in effect, as it was in terms, simply a 'call or assessment' upon all stockholders who had not paid for their shares in full. It was such as the directors might have made before the appointment of a receiver; and in making it the court, having by that appointment assumed the charge of the assets and affairs of the corporation, took the place and exercised the office of the directors. Scoville v. Thayer, 105 U. S. 143, 155; Hawkins v. Glenn, 131 U. S. 319, 329; Lamb v. Lamb, 6 Bissell, 420, 424; Glenn v. Saxton, 68 California, 353; Great Western Tel. Co. v. Gray, 122 Illinois, 630, 636, 640; Great Western Tel. Co. v. Lowenthal, 154 Illinois, 261.

The order of assessment, whether made by the directors as provided in the contract of subscription, or by the court as the successor in this respect of the directors, was doubtless, unless directly attacked and set aside by appropriate judicial proceedings, conclusive evidence of the necessity for making such an assessment, and to that extent bound every stockholder, without personal notice to him. Hawkins v. Glenn, 131 U. S. 319; Glenn v. Liggett, 135 U. S. 533; Glenn v. Marbury, 145 U. S. 499.

"But the order was not, and did not purport to be, a judgment against any one. It did not undertake to determine the question whether any particular stockholder was or was not liable in any amount. It did not merge the cause of action of the company against any stockholder on his contract of subscription, nor deprive him of the right, when sued for an assessment, to rely on any defence which he might have to an action upon that contract.

"In this action, therefore, brought by the receiver, in the name of the company, as authorized by the order of assessment, to recover the sum supposed to be due from the defendant, he had the right to plead a release, or payment, or the statute of limitations, or any other defence, going to show that he was not liable upon his contract of subscription."

The Pennsylvania Courts were not obliged to consider the assessment proceedings in the United States Courts other than the equivalent of a call or assessment. GREAT WESTERN TELEGRAPH COMPANY v. PURDY, supra.

"The whole effect of the order of assessment being to fix the amount which any stockholder liable under his contract of subscription should pay, and to authorize the receiver to bring suits against stockholders for the same, but not to determine whether the present

defendant, or any other particular stockholder was liable for anything, the Iowa court, by sustaining the defence of the statute of limitations, did not deny to the judicial proceeding of Illinois the full faith and credit to which it was entitled."

Assessment Proceedings Were Unnecessary.

Under the law of the State of Pennsylvania the assessment proceedings were not necessary prior to the institution of suit where, as in this case, the whole amount was needed to pay the claims of creditors. The whole assessment, if any, was due and was needed in this case in order to meet the claims of creditors and this was apparent immediately following the adjudication in bankruptcy. The Supreme Court of Pennsylvania in its Opinion (R. 128) states:

> "After the assets of the company were converted into cash and distributed among creditors, there remained a deficit of approximately $184,000. This situation made it apparent to all interested not only that the company was insolvent, but that there existed a large shortage for which the stockholders would be liable to the extent of the unpaid balance due on the stock held by them respectively".

It has always been held under such circumstances that no necessity for a call or assessment exists, nor is it necessary to take proceedings to fix the rate of the assessment when the full amount is needed.

In the case of CITIZENS AND MINERS SAVINGS BANK v. GILLESPIE, 115 Pa. 564, 572, in which a similar situation was present, to wit, a suit by the assignee for the benefit of creditors to recover the entire balance due on a subscription to the capital stock of an insolvent corporation, and the same objection was taken, to wit, that no assessment had been made, it was held (p. 572):

"There being no assessment in evidence, the learned Judge left it to the jury to find whether the whole of the unpaid subscription was required to pay the debts of the company. We see no error in this. If all the unpaid subscriptions were required to pay the creditors, no assessment was necessary under the authority of Yeager vs. Scranton Trust Co., 14 W. N. C. 296."

This principle of Pennsylvania law was recognized in the case of POTTS v. WALLACE, 146 U. S. 689, 701.

Not only is this the law of Pennsylvania but it is the law of other states. In WALSH, TRUSTEE, etc. v. SHANKLIN, 125 Kentucky, 715, 722, the Court holds that an assessment by the Court or the directors of a corporation is not necessary to enable a trustee in bankruptcy to maintain an action against the stockholders for unpaid subscriptions where the total amount due and payable from all stockholders is not more than sufficient to pay the debts of the corporation. To the same effect is the case of EDWARDS, TRUSTEE v. SCHILLINGER, 245 Ill. 231, 244.

The foregoing cases apply with full force under the facts of the instant cases. From the day when the Bergdoll Motor Company was declared insolvent until the present, the alleged unpaid stock subscription of Louis J. Bergdoll, if owing, was required to meet the debts of the company, for even with it added the assets would be insufficient to meet the liabilities. The trustee in bankruptcy could have brought suit against Bergdoll immediately after the adjudication without an order of assessment from the Court. The proceedings in the United States Court were totally unnecessary as a preliminary to the fixing of the liability of the respondent. They did not, as a matter of fact, either add to or subtract from his liability, and it was not necessary that any such proceedings should have been taken.

The Claim Was Barred by the Pennsylvania Statute of Limitations.

The assessment proceeding, therefore, was merely the equivalent of a call, not essential prior to the institution of suit in the present case and the right of action, if any, to recover the unpaid balance upon the stock subscription was based upon the law of contracts of the State of Pennsylvania and subject to its statute of limitations.

The statute of limitations of the State of Pennsylvania, to wit, the Act of March 27, 1713, Section 11, Smith's Laws 76, provides that:

> "All actions of trespass quare clausum fregit, all actions of detinue, trover and replevin, for taking away goods and cattle, all actions upon account and upon the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants), all actions of debt grounded upon any lending, or contract without specialty, all actions of debt, for arrearages of rent, except the proprietaries' quit-rents, and all actions of trespass, of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the five and twentieth day of April, which shall be in the year of our Lord one thousand seven hundred and thirteen, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue and replevin, for goods or cattle, and the said actions of trespass quare clausum fregit within three years after the said five and twentieth day of April next, or within six years next after the cause of such actions or suit, and not after."

Reducing the above citation to the part thereof particularly applicable to this case:

> "* * * all actions of debt founded upon any lending or contracting without specialty * * * shall be commenced and sued within the time and limitation hereinafter expressed and not after, that is to say * * * debt * * * within six years next after the cause of such action or suit and not after * * *."

This statute was applicable to the case at bar. In the case of SCUDDER v. UNION NATIONAL BANK, 91 U. S. 406, 412, Mr. Justice Hunt lays down the following principles:

> "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of the performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought."

In the case of GREAT WESTERN TELEGRAPH COMPANY v. PURDY, supra, this principle is further stated (339):

> "The limitation of actions is governed by the lex fori, and is controlled by the legislation of the State in which the action is brought, as construed by the highest court of that State, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions. McElmoyle v. Cohen, 13 Pet. 312; Bauserman v. Blunt, 147 U. S. 647; Metcalf v. Water-

town, 153 U. S. 671; Balkam v. Woodstock Iron Co., 154 U. S. 177."

In the case of TIOGA RAILROAD COMPANY v. BLOSSBURG & C. R. CO., 87 U. S. 137, where construction placed upon the State Statute by the State courts was followed by the United States Supreme Court, Mr. Justice Bradley said (p. 143):

> "The decisions upon construction of the statute are binding upon us whatever we may think of their soundness on general principles."

The Determination of the Time When the Action Accrued Was a Question of Local Law.

The Supreme Court of Pennsylvania in this case ruled, as it was its province to do, that the accrual of the right of action was a point for its determination and that the right of action accrued at the time the corporation was adjudged a bankrupt on the ground of insolvency. It has been uniformly held, under the law of the State of Pennsylvania, that at insolvency the right of action accrues to the creditors,—in this instance to the trustee in bankruptcy—to recover from stockholders any unpaid balance due upon stock subscriptions. The Pennsylvania cases clearly established the rule and the following are cited as leading cases upon the subject:

SWEARINGEN v. DAIRY COMPANY, 198 Pa. 68 (1901) 73;
NEWTON'S ESTATE, 46 Pa. Super. 40, 44;
HARRIGAN v. BERGDOLL, 281 Pa. 186, 189.

In the case of Swearingen v. Dairy Company, supra, the creditors of the Dairy Company brought a bill in equity against a corporation and its stockholders to enforce the payment of an alleged balance due on stock subscriptions. The Dairy Company was organized in 1889 and about July

1st, of that year, certain stock upon which had been paid 75% in cash was issued as full paid and came into the hands of the appellant. On January 5th, 1891, the company became insolvent and made an assignment for the benefit of its creditors. The present bill was filed June 30th, 1899, to collect the 25% unpaid subscriptions. The Court below entered a decree requiring payment to the receiver. Upon an appeal, the Supreme Court, before Mr. Justice Mitchell, held (p. 73):

> "When does the right of action by the creditors for unpaid subscriptions accrue? Such subscriptions are a fund in the hands of the stockholders charged with a trust for the payment of the corporate debts. This trust does not depend on any statute but is deduced on general principles of equity from the premise that the capital is publicly pledged to those who deal with the corporation for their security; Lane's App., supra. So long as the corporation is solvent, the whole subscription is due in accordance with its terms and is payable when and as called for by the corporation. But when the corporation becomes insolvent, the contract between it and the subscriber is terminated and his debt to it then is only for such part of his subscription as is required to pay the corporate debts. It is a debt not to it in its own right but in the right of its creditors. But it would seem that the status of the stockholder as holder of a fund liable at least contingently to the creditors, must be fixed at the time and by the fact of the ascertainment of insolvency. It is the general rule that insolvency fixes the relative rights of all the parties concerned. From that moment the unpaid subscriptions become part of the assets for payment of the creditors. * * * The right of action of the plaintiff, whatever it was, accrued upon the fact of insolvency of the dairy company shown by the assignment for the benefit of creditors, and the Statute of

> Limitations began to run from that date. The bill therefore, was too late."

This Court has uniformly ruled that the determination of the accrual of an action is a question of local law and is to be decided by the State court where the suit is brought. Thus in the case of GREAT WESTERN TELEGRAPH CO. v. PURDY, supra, it is stated (339):

> "The question at what time the cause of action accrued in this case, within the meaning of the statute of limitations of Iowa, was not a Federal question, but a local question, upon which the judgment of the highest court of the State cannot be reviewed by this Court."

This Court Distinguishes Between the Review of Decisions of Commercial Law in Cases Coming up From the State Courts and Those Coming up From the United States Courts.

The petitioner places great reliance upon the case of Scovill, etc. v. Thayer, 105 U. S. 143. In that case an assessment order was essential because the total liability of the stockholders on unpaid subscriptions exceeded the amount required to pay the creditors in full. This also was a case brought in the United States Courts and came up from the Circuit Court of Appeals. Petitioner cites a number of cases in his brief holding that the United States Courts are not bound by the decisions of the State Courts respecting questions of general commercial law. He fails to differentiate, however, between those cases when instituted in the United States Courts and cases such as the instant one where the decision of the Supreme Court of the State is to be reviewed by this Court on writ of certiorari. The distinction is clearly pointed out in the case of GREAT WESTERN TELEGRAPH CO. v. PURDY, supra, where this Court has stated (338):

"In many jurisdictions, the cause of action, within the meaning of a statute of limitations, would be held to have accrued at the time of the order for an assessment, and not before. It has been so held by the Supreme Court of the State of Illinois, where this company was incorporated and the order of assessment made, as well *as by this Court in cases coming up from Circuit Courts of the United States and unaffected by decisions of the highest court of the State in which those courts were held.* Great Western Tel. Co. v. Gray; Hawkins v. Glenn; Glenn v. Liggett; and Glenn v. Marbury, above cited.

"But the Supreme Court of Iowa in the present case held that, as it rested with the directors of the corporation to make that order, the delay in making it could not suspend the operation of the statute of limitations; and that the case was within the rule, established by a series of decisions of that court, that when a plaintiff could at any time, by making a demand, or giving a notice, acquire a right to recover against the defendant, the statute of limitations began to run when he might have done so. Great Western Tel. Co. v. Purdy, 83 Iowa 430, 433, and cases cited.

"The limitation of actions is governed by the lex fori, and is controlled by the legislation of the State in which the action is brought, as construed, by the highest court of that State, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions. McElmoyle v. Cohen, 13 Pet. 312; Bauserman v. Blunt, 147 U. S. 647; Metcalf v. Watertown, 153 U. S. 671; Balkam v. Woodstock Iron Co., 154 U. S. 177."

We respectfully submit, therefore, that in this case the Supreme Court of the State of Pennsylvania, in an appeal coming up from the State court, had a right to determine

the time when the right of action accrued upon a stock subscription of the corporation domiciled in the State of Pennsylvania, where the contract was entered into, and where the parties to the suit resided and there being no Federal question involved, *its* interpretation of the common law, according to its understanding, is not subject to review. PENNSYLVANIA RAILROAD COMPANY v. HUGHES, 191 U. S. 477, 486.

The Decision of the Court Below is Tenable on Other Grounds.

The Record in this case shows that the judgment of the Court below could stand upon other grounds, free from objection so far as Federal rights are concerned and under the rulings of this Court, no Federal question, therefore, is presented. WATERS PIERCE OIL COMPANY v. TEXAS, 212 U. S. 86, 106.

The action of the Court of trial in refusing to consider the defenses presented by the respondent was argued in the Supreme Court of Pennsylvania but was not passed upon by that tribunal, the Court saying (R. 128):

> "Several defenses were advanced at the trial, the only one, however, requiring consideration here is one raising the applicability of the Statute of Limitations."

There Was no Basis for the Verdict.

Among the defenses raised at the trial, the question of the actual value of the assets turned over to the corporation in payment of the stock was certainly a question for the jury to decide, particularly in view of the fact that no evidence was offered by the Petitioner as to the value thereof other than the Record of the assessment proceeding. The Respondent offered in evidence positive testimony showing that the amount paid for the stock was considerably in excess of $300,000, but the Court refused to submit the point

to the jury for decision and directed a verdict for the plaintiff (R. 51). The verdict therefore entered had no other basis for its amount other than the arbitrary amount set forth in the petition for an assessment and allowed by the Referee in the administrative order. This was error on the part of the trial Court. GREAT WESTERN TELEGRAPH COMPANY v. PURDY, supra (336).

The Suit Was Res Adjudicata.

The suit for the unpaid balance due upon the stock so far as this respondent was concerned was then *res adjudicata.* The record in this case shows that on March 10th, 1914, Louis J. Bergdoll (now known as Louis J. Bergson), respondent, filed with Richard H. Hunter, Esq., the referee before whom the cause was then pending his proof of claim against the bankrupt estate for $395,860 for moneys advanced from April 2nd, 1911, to the Louis J. Bergdoll Motor Company of New Jersey (R. 81 et seq.). The claim was objected to by the Trustee, petitioner herein, and the claim was reduced by the respondent to $310,000. After taking of testimony and hearing argument of counsel, the referee, on January 7th, 1915, filed his opinion and order (R. 83 et seq.) wherein he concludes as follows (R. 93):

> "On May 31, 1912, the assets and liabilities of the New Jersey Corporation were transferred to the Pennsylvania Company then newly organized. Among the liabilities transferred was the Louis J. Bergdoll loan account of $10,000. The amount paid to the New Jersey Company on account of capital stock was stated at $300,000. For the property thus transferred the Pennsylvania Company issued 3000 shares of full paid, non-assessable stock of the par value of $100; Louis J. Bergdoll receiving 2998 shares, Frank J. Fanning and E. Lawrence Webster one share each."

And finally concluding (R. 93-94) as follows:

"The Referee finds that the sum of $300,000 was contributed by Louis J. Bergdoll to the capital stock of the New Jersey Company, and that the stock of the Pennsylvania Company, which took over its assets and liabilities thereby became full paid.

"The Referee disallows the claim of Louis J. Bergdoll against the bankrupt for the sum of $300,000.

"The Referee allows the claim of Louis J. Bergdoll as a creditor of the bankrupt in the sum of $10,000."

From an examination of the opinion of Referee Hunter, it will be found that all of the questions of fact involved in the present controversy were presented in the proceedings had before him and were material and necessary and actually and directly in issue in the determination of the controversy then before the Referee in said proceedings and were there judicially passed upon and determined.

We respectfully submit, therefore, that the Supreme Court of Pennsylvania could have ruled that the contention respecting the right of the petitioner to recover upon a stock subscription should have been decided in favor of the respondent on the ground that the point was already adjudicated.

The Petitioner is Estopped to Deny that the Stock Was Full paid as to the Respondent.

Further, the petitioner having taken this position in the proceeding before the Referee he could not, under the law of the State of Pennsylvania, change his position to suit the occasion and maintain that the stock of the Pennsylvania Company was not paid for by the cancellation of the capital stock liability against the New Jersey corporation, which liability was assumed by the Pennsylvania corporation, when he had been successful in the previous case on that contention. (16 Cyc. 799):

"A claim made or position taken in a former action or judicial proceeding will estop the party to make an inconsistent claim or to take a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party, where the parties are the same and the same questions are involved. Thus a party who has successfully interposed a defense or objection in one action or proceeding cannot shift his ground and take a position in another action or proceeding which is so inconsistent with his former defense or objection as necessarily to disprove its truth".

See also McQUEEN'S APPEAL, 104 Pa. 595, 601, 602:

"It is settled that, 'A man who obtains or defeats a judgment by pleading or representing an act in one respect, will be precluded from giving it a different and inconsistent character in a subsequent suit upon the same subject.' "

To the same effect will be found:

ARONSON v. CLEVELAND, &c. R. R. CO., 70 Pa. 68, 69;
CAMPBELL v. STEPHENS, 66 Pa. 314, 318;
MOSER v. R. R., 233 Pa. 259, 270.

CONCLUSION.

Under all the circumstances, it is respectfully submitted that the decision of the Supreme Court of the State of Pennsylvania in this case on the question of the Statute of Limitations and the accrual of the action in this case is final.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 181.—October Term, 1925.

Frank A. Harrigan, Trustee, etc., Petitioner, *vs.* Louis J. Bergdoll, now known as Louis J. Bergson.	On Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

[April 12, 1926.]

Mr. Justice Brandeis delivered the opinion of the Court.

Harrigan, trustee in bankruptcy of the Louis J. Bergdoll Motor Company, brought this suit in a state court of Pennsylvania, on July 13, 1921, to recover $155,571.79 and interest from Bergdoll, a stockholder in the company. The defendant, a resident of the State, pleaded the general six-year statute of limitations. The claim sued on is the assessment, ordered by the bankruptcy court, of 51.85% of the par value on shares in the company held by the defendant, the amount being found by that court to be unpaid on the stock and required to satisfy the liabilities. The corporation had been organized under the laws of Pennsylvania about April 1, 1912; had its place of business there; and was adjudged bankrupt in the federal court for the eastern district of the State in April, 1913. It was then insolvent. In May, 1913, it had become apparent that the company's liabilities largely exceeded its assets other than the amounts unpaid on its capital stock. The petition of the trustee to the bankruptcy court praying that the assessment be made, and that he be authorized to proceed to collect the same, was not filed until October, 1917.

The application then made was strenuously opposed by Bergdoll. The order for the assessment was entered by the referee in February, 1918, but was not confirmed by the District Court until July, 1919, 260 Fed. 234. That was more than six years after the deficiency had become apparent. The judgment of the District Court, besides making the assessment, ordered Bergdoll to

pay the same. On this ground, among others, Bergdoll appealed to the United States Circuit Court of Appeals. In March, 1920, that court affirmed the judgment insofar as it adjudicated the necessity for an assessment, fixed the rate and levied the same upon those who appear *prima facie* to be subject thereto, but reversed the judgment insofar as it had adjudged the personal liability of Bergdoll and the amount thereof. 263 Fed. 279, 281, 283. Thereafter this suit was brought in the state court. The trial court ruled that the statute of limitations had run before the suit was instituted. Its judgment was affirmed by the highest court of the State, 281 Pa. 186. This Court granted a writ of certiorari. 266 U. S. 598.

The reversal by the Circuit Court of Appeals of the judgment of the District Court insofar as it adjudged the liability of Bergdoll was in accord with the rule, settled in the third circuit and elsewhere, that the order of assessment and levy is a purely administrative proceeding preliminary to the institution of a suit; that in the absence of consent there is no jurisdiction in the bankruptcy court to fix the personal liability of a stockholder; and that any person whose stock is assessed may when sued in a plenary action on such assessment in any court of competent jurisdiction make any defence thereto affecting his individual liability, but may not attack the administrative order of the District Court in determining the need of an assessment, or in levying the same. *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 336-7; *In re Remington Automobile & Motor Co.*, 153 Fed. 345; *In re Munger Vehicle Tire Co.*, 168 Fed. 910; *In re M. Stipp Construction Co.*, 221 Fed. 372. The District Court recognized this rule. It erred, as the Court of Appeals held, in concluding that Bergdoll had consented to the exercise by the bankruptcy court of jurisdiction to determine whether he was personally liable.

The decision of the Supreme Court of the State holding that the statute of limitations had run was said to be an application of the state law, settled at least since *Swearingen* v. *Sewickley Dairy Co.*, 198 Pa. 68 decided in 1901, that the liability of a shareholder in a Pennsylvania business corporation to creditors of the company on account of stock not full-paid becomes fixed at the time it is definitely ascertained that the company is insolvent and will be obliged to call unpaid stock subscriptions in order to satisfy its obligations; that as soon as the deficiency of assets becomes ap-

parent, it becomes the duty of creditors, if they desire to obtain payment of their claims, to take the necessary steps to bring about a formal determination of the extent of the assessment on unpaid stock subscriptions necessary to liquidate the indebtedness and also to begin proper action to collect such amount from the respective stockholders within the time limited by the general statute of limitations. The sole question for decision is whether the state law governs in view of the proceedings had in bankruptcy.

The trustee contends that the statute of limitations did not begin to run until March 27, 1920, the date of the judgment of the Circuit Court of Appeals which confirmed the order making the assessment and authorized suit to collect it. This contention rests upon the assumption that Bergdoll's liability remained contingent until the entry of that judgment and, hence, that the cause of action arose then. The highest court of Pennsylvania has held that assessment was not a condition precedent to the existence of the cause of action; and that the liability became absolute without an assessment, either by the corporation or by any court, as soon as the need of this asset for paying debts became apparent. Compare *Potts* v. *Wallace,* 146 U. S. 689; *Kelley* v. *Gill,* 245 U. S. 116, 121. The nature, the extent, and the conditions of the liability of a stockholder on account of stock not full-paid depend primarily upon the law of the State or county by which the corporation was created. *Glenn* v. *Liggett,* 135 U. S. 533, 548. Compare *Benedict* v. *Ratner,* 268 U. S. 353, 359.[1] That law determines whether the liability is to the corporation or is to creditors.[2] Compare *Converse* v. *Hamilton,* 224 U. S. 243, 253; *Selig* v. *Hamilton,* 234 U. S. 652, 658. If the liability is to the corporation, it passes like other choses in action to the trustee in bankruptcy. The Bankrupt Law does not modify this right of action against the stockholder or create a new one. It merely provides that the right created by the state law shall pass to the trustee

[1]See Maryland Rail Co. *v.* Taylor, 231 Fed. 119, 120; Enright *v.* Hecksher, 240 Fed. 863, 878; In re Manufacturers' Box & Lumber Co., 251 Fed. 957; Wallace *v.* Weinstein, 257 Fed. 625; Johnson *v.* Louisville Trust Co., 293 Fed. 857.

[2]See In re Jassoy Co., 178 Fed. 515; Babbit *v.* Read, 215 Fed. 395; 236 Fed. 42, 49, 50; Courtney *v.* Georger, 228 Fed. 859; Courtney *v.* Croxton, 239 Fed. 247; Petition of Stuart, 272 Fed. 938; In re Pipe Line Oil Co., 289 Fed. 698.

and be enforced by him for the benefit of creditors. The order of assessment and the direction that the trustee sue to recover were appropriate administrative proceedings in bankruptcy. See *In re Miller Electrical Maintenance Co.*, 111 Fed. 515. But it was for the court of Pennsylvania to say whether they were indispensable to the enforcement of the stockholder's liability.

Scovill v. *Thayer*, 105 U. S. 143, upon which the trustee relied, is not inconsistent with the conclusion stated. That was a suit brought in the federal court for Massachusetts to enforce the liability of a stockholder in a Kansas corporation. The courts of Kansas had not settled when the cause of action created by its law arose. The trial court and this Court were, therefore, obliged to decide that question of state law. See *Burgess* v. *Seligman*, 107 U. S. 20, 33.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.